LECTURES ON

ADMINISTRATIVE REGULATION

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GRADUATE SCHOOL
U. S. DEPARTMENT OF AGRICULTURE
WASHINGTON, 1945

Public Administration Publications
of the Graduate School
U. S. Department of Agriculture

FOREWORD

Lord Hewart, with his *The New Despotism,* and other men less learned who habitually decry the encroachments of "unbridled bureaucracy" are King Canutes before the tides of government in the service state. Whether we approve or lament it, administrative agencies are playing an expanding role in regulating the lives and properties of all of us, sometimes with only the most general guides or policies from the statutes enacted by elected representatives. The public must look increasingly to self-imposed safeguards within administration.

It is fitting, therefore, that the literature of the art or science of administrative regulation be extended wherever possible. This publication is offered to a wider audience as such an extension. It consists of lectures delivered under the auspices of the Graduate School of the Department of Agriculture in the spring of 1944. They were organized primarily for the benefit of Government officials responsible for regulatory functions—to bring to them the most significant experience and the operating philosophy of the chief wartime and peacetime agencies extensively engaged in administrative regulation. The original addresses were made to luncheon meetings of sixty to seventy Government officials designated by heads of agencies or heads of regulatory branches of agencies. Mr. Ashley Sellers, Assistant War Food Administrator, acted as chairman.

Special acknowledgement is due the committee which planned the lectures: John Thurston of the Administrative Council (Chairman), H. Dean Cochran, Chief of the Division of Personnel Management of the Forest Service, and Verne B. Lewis, Assistant to the Director of Finance, all within the Department of Agriculture.

Eldon L. Johnson,
Director, Graduate School

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PREFACE

THE LECTURES which follow illustrate clearly the great powers which it has been found necessary to vest in administrative officials of the National Government. In wartime such delegations are imperative, although we are obliged to admit that the magnitude of the problems which must be dealt with and the speed with which action must be taken, precluding full deliberation, almost transcend human vision and ability.

In peacetime the problem is different only in degree. Few persons realize the weight of the decisions which Federal officials must make. Determinations affecting the welfare of the entire Nation are made not only by heads of departments but also by chiefs of bureaus, and even by chiefs of divisions within bureaus. Despite this, we have not defined the position of Federal officials or taken as effective measures as we might to help ensure wise decisions.

As to the position of Federal officials, the only tenable view would seem to be that they must be impartial servants of the entire Nation and, whenever given power of decision, must act solely in the light of the public interest, difficult as it frequently may be to discern what that interest is. Of course, they must keep within the policies set by Congress, the President, and the department heads and, in fact, must carry out these policies willingly and energetically; but the essential point is that in their field of discretion they must never surrender their integrity and act for a special interest rather than the general interest.

Equally important, there must be men of great ability in the National service. Since it is clear that the National Government will continue to be charged with functions and decisions of the very highest order, it would obviously be the part of wisdom to select the most capable men in the country to fill the intermediate and higher government positions. Although the Civil Service of the United States is a very competent group, conscious of its responsibilities to the public, we do not consistently draw the highest ability into permanent government service. From the long-run point of view, what is needed most in this respect is the adoption of a practice of recruiting the ablest young men and women of the country into the Federal Service —Civil Service examinations are making a beginning in this direction—and of so placing them that they have an opportunity to develop their abilities in a variety of situations under older officials. Unless these young men and women can go directly upon completion of their school work into positions that promise a permanent and challenging career, they will seek employment elsewhere. Once established in private positions, they will seldom accept public employment.

The role of Congress in reviewing the exercise of administrative powers is very important. One of the great functions of Congress should be to protect the citizens of the country against the possibility of unjust official action and to criticize unwise action. If department heads were subject to questioning on the floor of Congress with regard to their acts and those of their subordinates, this important function undoubtedly would be more effectively performed. The inevitable increase in the power of administrative officials should be balanced by better means for review of their acts by the elected representatives of the people.

It is very interesting to see from these lectures how much attention has been given to the subject of advisory committees. If wartime experience is any guide, we appear to be in process of bringing the interests of affected groups into the open and of devising ways by which the views and problems of these groups can be presented through regular, recognized channels. That is a significant development and constitutes a very important addition to the methods of democratic government. There is some danger, however, that official action may tend to be based principally on the evidence and demands presented by the organized interests. Such a tendency would be very natural and human. It is for this reason all the more important that we give serious thought to the responsibility of public officials to represent the public interest, which is the interest of the whole and which includes the interest of the millions who are not organized and therefore frequently have no one to speak for them, in connection with administrative decisions, other than the public officials themselves.

JOHN THURSTON,
Chairman, Program Committee

ADMINISTRATIVE REGULATION

by

ASHLEY SELLERS

Assistant Administrator, War Food Administration

THE TOPIC chosen for this series is "Administrative Regulation." We shall hear six lectures by representatives of Federal agencies engaged in making and administering rules which affect the liberties and properties of many people.

Administrative agencies have a twofold responsibility. They must administer their respective laws in such a manner as to promote the public interest, and at the same time they must take pains, both for legal and practical reasons, to guard the rights of individuals affected by their actions. In this series of lectures, we shall learn something of the techniques utilized by Federal agencies in fulfilling this dual responsibility.

It is the belief of the sponsors of these lectures that all of us who are concerned with administrative regulation in wartime will benefit from these common meetings, in which we shall examine and evaluate our experiences.

This is an appropriate time to consider problems of Federal administrative regulation. Although this global war has not given rise to Federal administrative agencies for the first time, it does furnish the occasion for a vast acceleration of the whole administrative process. It has been necessary for the older agencies to reexamine their objectives in the light of changing conditions and to redirect many of their programs. At the same time emergencies created by the war have called into being new agencies with far-reaching powers. In one short sentence contained in the Second War Powers Act of 1942, the Congress has authorized the President, when he is satisfied that the fulfillment of requirements for national defense, private account, or export will result in a shortage, to allocate the material or facility in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. A series of new Federal administrative agencies have been created to exercise this power under which the total food and other material resources of the Nation have been mobilized to win the war. All this has tended to make it more important than ever for Federal agencies to pursue policies that adequately protect public and private interests alike and to adopt methods which will ensure that these objectives will be attained.

We have all observed the growth in the number and power of Federal administrative agencies. In Washington's administration legislative power was delegated to executive officials, and it has been

estimated that in the first 10 years of our Government 19 such delegations took place. Today, it is estimated that over 1,300 instances of delegation of legislative power are to be found in the Federal system. This power is now being exercised by over 100 administrative agencies in about 300 classes of cases.

Federal administrative agencies have grown and multiplied and have been given power because of the increasing demand for Governmental regulation to secure to the people liberties arising from an expanding concept of the social and economic rights of man.

Following the War between the States and the Reconstruction period, the need for complex regulation in the specialized field of railroad transportation caused the Congress in 1887 to establish the Interstate Commerce Commission, the first of the great regulatory agencies. Subsequently, when Congress has set about devising controls over such matters as radio broadcasting, employer-employee relations, security and commodity transactions, banking, and motor and air travel, to mention only a few, it has found the subject matter too intricate and technical to be regulated in detail by statute.

In this time of war, in matters relating to price control and allocation of short supplies, the Congress has reached a similar conclusion. As a result, the legislature has, by a series of statutes, prescribed the basic policies to be followed and has delegated to administrative agencies responsibility for carrying out the details in accordance with Congressional standards.

It was found also that the courtroom is not the place to deal with highly specialized types of controversies. Such agencies as the Federal Trade Commission have been organized to dispose of these cases. Agencies of this type can develop an expertness and can evaluate controversies involving the public welfare in a manner not open to judicial tribunals. Courts must treat each case as an isolated set of facts involving the parties to the proceedings. A court, unlike an administrative tribunal, may not consider, in connection with the case at hand, the facts, figures, and information relating to general public interest in the issues at bar. An administrative agency may do this, however, and usually is given a legislative mandate to bring public interest to bear upon the issues decided by it.

Increasing Governmental control of private affairs has also influenced the development of administrative agencies. In this field a rigid rule cannot always be devised. Experimentation, flexibility, and discretion are the crux of regulation. The Congress, which meets periodically, cannot keep at its fingertips the myriad and changing facts which necessitate rapid change in regulation. Reliance on agencies informed by experience and possessed of a familiarity with the subject matter arising from constant dealing with the same problems has been the solution.

There are many types of Federal administrative agencies. Some people go so far as to argue that there should be only one type. I

think some observations are in order with respect to this subject. The duties and powers of administrative agencies are derived from statutes, or from executive orders issued pursuant to statutes. There is no common law for administrative agencies.

Each time the Congress has created an agency it has done so in order to fill a current need. It has shaped the particular agency in the light of that need. Since the conditions giving rise to statutes creating agencies have not been the same, the agencies themselves have not been created according to a common pattern. In short, the process of creation has been essentially pragmatic.

In some instances, in creating an agency and combining in it legislative, judicial, and executive powers, the Congress has created plural-headed agencies, because it has believed that the private interests affected would be better protected by group decisions than by those of a single administrator. In order to make plural-headed agencies as independent of the executive branch as possible, and to minimize political influences, the Congress has at times provided for staggering the terms of office of agency heads, for making them longer than the term of the President, and has also provided that not all members of the agency shall be chosen from the same political party.

An examination of the administrative structure of the Federal Government shows that private interests may be regulated by various authorities, as follows:

1. The President and the heads of the executive departments. Although the President ordinarily acts in an executive capacity, he also exercises certain powers that touch the rights and interests of individuals. Appointment and dismissal of public officers, certain control over money and banking, and action with respect to tariff schedules are examples of these powers.

The Congress has also vested in the heads of some of the executive departments powers of a legislative or judicial nature, in addition to their traditional executive powers. Some 40 statutes in the economic realm vest administrative authority in the Secretary of Agriculture. Until recently this authority has been concerned with the peacetime economy of the United States. Since the beginning of the war, however, by statute and Executive order, the Department has been authorized to perform other regulatory work relating to the war food program of the Government. Many of these regulatory functions are now carried out by the War Food Administration.

2. Administrative authority over private interests may be vested in independent agencies or divisions within one of the Government departments. Examples are (1) the Comptroller of Currency of the Treasury Department and (2) the Wage and Hour Division of the Department of Labor, created by the Fair Labor Standards Act of 1938, at the head of which is an administrator appointed by the President. Some of these independent agencies receive their authority

directly from the Congress, and their rulings and decisions are reviewed by courts without the intervention of the head of the department. In other cases, the heads of some independent agencies report directly to the President and not through departmental channels.

3. Power to issue rules affecting many people and to decide controversies arising under these rules is vested in independent regulatory boards and commissions. We have the Interstate Commerce Commission, the Federal Trade Commission, the Securities and Exchange Commission, the National Labor Relations Board, the National War Labor Board, and the Board of Governors of the Federal Reserve System. These boards and commissions are plural-headed, consisting of from 3 to 11 members.

4. The independent regulatory agency, at the head of which is a single administrator. The Office of Price Administration, with its rule-making powers, is a good example of this type.

5. Independent agencies of a nonregulatory type which, nevertheless, function in such a way as to affect many people. There are the General Accounting Office, the Civil Service Commission, the Veterans' Administration, the social security activities of the Federal Security Agency, the Railroad Retirement Board, and the National Mediation Board. These agencies do not regulate any economic field or activity, but they do make decisions affecting private individuals. Most of their action is in the form of decisions and is taken without formal procedure. Usually these agencies are not subject to judicial control so long as they stay within their respective jurisdiction.

6. Private interests are also affected by Governmental action through its corporations, such as the Tennessee Valley Authority, the Inland Waterways Corporation, and the Panama Railroad. These corporations exercise no regulatory powers as such, but make ordinary business decisions. Individual rights against them are contractual in nature and are enforced accordingly.

7. Finally, administrative powers are sometimes vested in Federal legislative courts, such as the United States Customs Court, the Court of Customs and Patent Appeals, and the Court of Claims. All these courts are creatures of the Congress and, unlike Federal courts deriving their power solely from Article III of the Constitution, which may exercise only judicial power, they may be authorized by the Congress to participate in rule-making or policy-determining functions. Private interests are, of course, directly affected by the decisions of these tribunals, which proceed in much the same fashion as courts exercising strictly judicial powers.

Mr. Justice Oliver Wendell Holmes once said, with respect to the right of an individual to participate in the making of a rule affecting his interests, that the Constitution does not require all public acts to be done in town meeting or in an assembly of the whole.[1] Undoubt-

[1] Bimetallic Investment Co. v. State Board of Equalization (239 U. S. 441) 1915.

edly, this statement is true of many acts of public authority which affect the person or property of individuals without giving them a chance to be heard. But it is also true that the Congress, in vesting vast powers in Federal administrative agencies, has, to a large extent, provided that these powers shall not be exercised without first giving notice and opportunity for hearing to individuals who are affected. In many cases the Congress has gone still further and provided that final action of the agency shall be based solely on a record of evidence obtained at a public hearing of interested parties.

When these Federal administrative agencies exercise powers of a judicial nature, notice and hearing are made necessary by the Constitutional provision that no person may be deprived of life, liberty, or property without due process of law. With respect to exercises of legislative or rule-making powers, the statutes usually make provision for notice and hearing, both as a matter of fair play and as an aid to the agency in gathering data to be used in making the rule. Normally, therefore, individuals affected by administrative regulations and decisions participate in making them prior to their issuance. Of course this does not mean that every public officer must obtain public approval of every one of his actions.

In wartime, the rule-making or legislative powers of Federal administrative agencies, with respect to a number of subjects, are exercised without prior notice and hearing to persons affected. Frequently, however, before issuing regulations under the war powers, Federal agencies consult with committees composed of representatives of the affected industry. The War Production Board, the Office of Price Administration, and the War Food Administration have made extensive use of Industry Advisory Committees before and after issuing wartime priority, allocation, and rationing regulations. Such a committee serves, after the regulations are issued, as a focal point to gather the reaction of the industry and to compile data for amendments and revisions. In all this the committee is advisory only. As a matter of strict legal necessity, the views of its members need not be followed.

Courts have sustained wartime regulations that were issued without notice and hearing. This is indicative of one of two things: Either notice and hearing are not constitutional prerequisites to the exercise of the rule-making power and are normally afforded in peacetime only as a result of a statutory requirement, or "due process" in war and peace is not the same. This is one of the great unsettled problems in this field.

Any realistic appraisal of the wartime relations of Federal administrative agencies with private interests probably shows why the courts thus far have not had to settle the question. Practically, in almost all instances, persons affected are consulted in one way or another, and I think it is good that this is so.

REGULATORY PROCEDURES IN THE NATIONAL WAR LABOR BOARD

by

LLOYD K. GARRISON

Public Member, National War Labor Board

The National War Labor Board is a tripartite body composed of equal numbers of representatives of industry, labor, and the public. There are 12 tripartite regional boards, appointed and supervised by the national board. The national and regional boards are tripartite, not only as to their members but also as to their staffs; and within the tripartite staffs, many functions which play an important part in the mechanism of the board are carried on jointly. The regional boards are concerned with a good deal of policymaking, and they decide most of the cases. A very high degree of informality characterizes all of our proceedings. We live in a goldfish bowl and everything we do is seen by the public.

The National War Labor Board has a total staff of 2,400 people, including the staffs of the regional boards. Each month we have an intake of 500 to 600 disputes and over 12,000 applications for wage adjustments. We have a mixture of legislative, executive, and judicial functions, which will become apparent as I go along.

Wage Stabilization

As the numbers I have just cited indicate, we have two main functions: to decide labor disputes and to administer the wage-stabilization program. I shall speak first on the wage-stabilization side of the Board's work. There, our sailing directions are found in Executive orders of the President and in regulations of the Economic Stabilization Director, all issued pursuant to the Stabilization Act of October 2, 1942. The policies by which the Board must guide itself are incorporated in these Executive orders and regulations. These policies, in the main, were developed by the Board through case-law processes before they were codified in the Executive orders and regulations.

I wish to stress the importance of the Board's case-by-case method of developing its law. We do very little legislating, in the ordinary sense of the word. We have a number of general orders which are chiefly informational, having comparatively little in them of substance. These general orders have been adopted in all instances without public hearings, but they have been preceded in most instances by conferences with interested groups and by discussions within the tripartite staff committees, and in all instances have been

preceded by action by the tripartite board. So that into the making of these general orders has gone labor, industry, and public thinking.

We have developed a very considerable case law in the working out of the wage-stabilization policy, both before the Executive orders and regulations were issued and subsequently, continuously embroidering upon the rather simple formulae by which the Board is supposed to steer itself.

I would like to take an ordinary wage application from the beginning and run it right through the mill, to give you an idea of the procedure.

The typical case starts out in the field. Some cases, of course, are dealt with by exceptional means, but I shall omit those. In the typical case, the employer—generally an employer without a union, but if there is a union, with the union joining—files an application with the local office of the Wage and Hour Division, Department of Labor. We have made an arrangement with the Wage and Hour Division whereby all of its local offices throughout the country serve as our receiving stations. The Wage and Hour Division office looks over the application, tells the employer whether it is in proper shape, and helps him, if he needs help, in filling it out. The employer may ask the office of the Wage and Hour Division: "Do I need the board's approval for this kind of an adjustment?" [1] Or he may ask, "Is this the kind of adjustment I can make without approval?" The Wage and Hour Division office is empowered to tell him yes or no. By this means we have tried to simplify matters as much as possibble for employers.

If the Wage and Hour Division finds that this is a case that requires approval by the Board, the application then goes to the nearest regional War Labor Board. There it is processed by the experts—the wage analysts—and from them it goes, in most regional boards, to the top man in the Wage Stabilization Division, the director, who is empowered to make an initial ruling as to whether the application should be granted or denied. If he grants it, that ends the matter. There are subsequent reviews to see that he does not stray from the permitted paths, but, save in the most important cases, his approval of the particular application is final. If he turns down the application as inconsistent with the wage stabilization rules, then the applicant may appeal to the regional board—normally to a tripartite Appeals Division of the Board. That tripartite Appeals Division presents its recommendations to the full regional board, which normally approves what the Division recommends. If the regional board denies the application, the applicant has a right to petition the War Labor Board in Washington to reverse the decision of the regional board. He has to show in his petition that the regional board clearly violated the national policy. If he cannot show that, the petition is not enter-

[1] There are certain exemptions from the wage stabilization controls.

tained. If the petition is entertained, it goes to a tripartite Appeals Committee of the War Labor Board. That committee makes recommendations to the full War Labor Board, which finally disposes of the matter. Sometimes public hearings on the applications are held by the regional boards, and sometimes by the national board on appeal. Some wage applications cross regional boundaries or are otherwise sufficiently complex or important to warrant direct processing by the national board instead of by the regional boards, but the ordinary case is handled as I have described it.

One of our most difficult tasks is the *enforcement* of the wage-stabilization program. Here, we have a large-scale executive function to perform. The Economic Stabilization Director devolved upon us the responsibility for determining whether or not particular employers have violated the stabilization regulations. The Act of October 2, 1942, authorized the President of the United States to prescribe to what extent unauthorized payments of wages should be disallowed for internal revenue purposes and for purposes of calculating payments under Government contracts. The President, through the Economic Stabilization Director, provided that the unauthorized payments should be disregarded to the extent of 100 percent. For example, if an employer improperly increased the wages of his workers by 5 cents, the Commissioner of Internal Revenue would then disregard, as deductible costs for income tax purposes, not just the 5-cent increase, but the total wage bill. All the wages affected by the 5 cents would be nondeductible for income tax purposes.

This is a very sharp sanction, and is quite new in our experience. Indeed, the sanction is sometimes so harsh that we have empowered our regional boards, which handle enforcement matters in the first instance, to recommend clemency in given cases. The clemency recommendation goes to the Commissioner of Internal Revenue because he is the fellow who notes down in his little black book that Mr. Smith cannot have any wage deduction when his income tax comes around next year. The Commissioner of Internal Revenue has been authorized by the Economic Stabilization Director to accept, and in practice he always does accept, our recommendations for clemency. These recommendations may range all the way from 100 percent to 1 percent, depending on the facts and circumstances.

Now for the enforcement procedure. The Wage and Hour Division again is at our service. Their inspectors, who go about to inspect employers' books for violations of the wage and hour law, also inspect the books to see if the employers have raised wages without getting the board's approval. These spot checks, which cover only a very small fraction of the total field of industry, come into our regional boards and are sorted over. If the regional attorney thinks a given case warrants a full investigation, he gets the approval of the regional board and then goes ahead with an investigation, either through his own

staff or through the facilities of the Wage and Hour Division. The great bulk of the actions taken to enforce the wage-stabilization program are taken as a result of what the Wage and Hour inspectors turn up through these spot checks. Another source, naturally, are complaints brought in by employers and by unions. Employers sometimes complain that other employers are unfairly competing with them by raising wages and stealing their labor without the approval of the Board, and unions sometimes complain that nonunion employers are raising wages without the Board's approval when the union employers are not doing so. Those are not the only forms of complaint, but they are the main ones.

If a full-dress investigation has been undertaken, when the facts have been gathered they are submitted to a tripartite division of the regional board, which holds a public hearing. The employer is there and has the right to examine and cross-examine witnesses, a full record is taken, and the division makes a finding as to whether or not the employer did violate the regulations and the rules. If the finding is that he did, then the division has to commune with its own soul and decide whether there are mitigating circumstances sufficiently persuasive to induce the division to make a recommendation to the Commissioner of Internal Revenue for some degree of clemency. In a very large majority of cases, the division recommends that no sanctions be imposed. The employer has increased the wages through ignorance, through mistake, or he was pressed so violently by circumstances of one sort or another that one feels a good deal of sympathy for his plight, and it is hard enough for him to have to roll his wages back, which he has to do; therefore in the greater number of cases, the regional boards decide that rolling back the wages is about all that should be required of him. Frequently, it is found that the increases are perfectly approvable under the program, and in such cases the approval is generally made retroactive in effect, at least where the employer did not deliberately by-pass the Board.

The Act of October 2, 1942, provides criminal penalties for violation, none of which have yet been invoked.

If the erring employer, or the allegedly erring employer, is dissatisfied with the regional board's findings, he may then appeal to the National War Labor Board in Washington, and his appeal is heard in a public hearing before the full Board. We attach great importance to the necessity of due process of law in connection with the enforcement program.

LABOR DISPUTES

Now, let me discuss our handling of dispute cases. Here, as to all nonwage issues, the War Labor Board acts without any guidance except the precedents which we have hammered out ourselves on the hard anvil of cases. The greater number of disputes these days in-

volve wages as well as other issues, and as to wages we are bound by the stabilization rules, but as to all other issues we are bound by no rules except our own consciences and the requirement of the War Labor Disputes Act that our orders shall embody terms and conditions "customarily included in collective bargaining agreements," which are "fair and equitable" under the circumstances. Those phrases are not always easy to apply.

One of the great issues for example in the Petrillo case, is whether the union's demand for a percentage from the sale of records, to be deposited in an unemployment fund to be administered by the union under certain safeguards, involves terms and conditions which can be said to be customarily included in collective-bargaining agreements. The union has listed some 21 instances in which provisions of that general sort have been made in collective agreements. Is that sufficient in degree to qualify as a "customarily included" provision? That is only one of the questions we must answer.

Let me take a typical dispute case now and run it through the mill. The dispute first comes to us from the Conciliation Service of the Department of Labor after the Conciliation Service has wrestled with it, perhaps at great length, and has concluded that nothing can be done and that, unless it is decided, the case is likely to lead to a substantial interference with the war effort. Then the case is certified to us. It is referred to a tripartite New Case Committee, which determines, in the first place, whether we have jurisdiction over it. Some cases are certified to us by mistake; they may be under the jurisdiction of the National Labor Relations Board, or they are, perchance, excluded from our jurisdiction by the terms of some statute or order, as in the case of agricultural wages, railroad cases, and the like. The tripartite New Case Committee also determines what to do with the case: is it important enough for the National Board itself to hear the case at the national level, or should it be sent to one of the regional boards for disposal? Only about one or two cases a week are retained for direct handling in Washington. Those are cases of national importance, like the Petrillo case. The rest are sent out to the appropriate regional boards.

The regional boards then have their own tripartite New Case Committees which receive the offerings from Washington and subject them to a somewhat closer inspection than we have given them here. Very frequently they will say: "This is the kind of a case that ought to be referred back again to the parties for further collective bargaining or conciliation, or for arbitration; here are 27 issues, and the parties must make a further effort at settlement." Disputes which are really nothing more than individual grievances are almost always sent back to be arbitrated.

If the regional board's New Case Committee concludes that this is a case that ought to be handled in the regular fashion, then a tripartite

panel is appointed from lists of people who have been unanimously approved by the tripartite regional board itself.

These panels are a "grass-roots" institution. They meet, generally, at the scene of the dispute; they hear the parties, generally without the taking of a transcript, because we found that it would cost something in the neighborhood of a million dollars a year to make transcripts of all our hearings, and we also found it was better labor-relations policy not to have people making speeches for the record. So the parties sit around a table and tell their stories, and a good many settlements are informally arrived at in the process.

In theory, we do not conciliate, we do not mediate—that is the task of the Conciliation Service—but, in fact, it is impossible to escape mediation altogether at any stage of the proceedings. You can't help it; it is inherent in the system. If no settlement is arrived at before the panel—and in the greater number of cases no settlement is possible—the panel makes a report to the regional board, setting forth the facts as the panel sees them. The parties have an opportunity to write comments on the report, and on any dissenting opinions, and these comments are considered by the regional board along with the report and the opinions. The regional board then determines whether to hold another hearing.

In a very considerable proportion of the cases, certainly in all the important ones, a further public hearing is held before the regional board. If either side is dissatisfied with the decision of the regional board, they may petition the National Board for review. They must show in their petition that the regional board's decision violates some clearly enunciated principle of the National Board or presents a novel question of national importance. If the petition is entertained, it goes to a tripartite Appeals Committee of the National War Labor Board and from that committee to the National Board itself.

We now are receiving about 40 appeals a week in dispute cases and about 10 appeals a week arising out of the denials of voluntary wage applications. We have two tripartite Appeals Committees, which are very ably staffed.

When an appeal finally gets to the level of the National Board, the Board may or may not hold still another public hearing, depending on the importance and complexity of the case. Such hearings are, however, rather rarely found necessary.

In all the cases handled directly by the National Board and not sent to the regions, public hearings are held by the National Board panels and, in most cases, by the National Board itself after the panel report is in.

Now, for the *compliance* function of the Board. The end process of the disputes procedure is a directive order, either at the regional level or the national level. For simplicity, I will take it at the na-

tional level. We make a directive order and we say, in the language of the National War Labor Disputes Act, "These are the terms and conditions which shall govern the relations between the parties until the further order of the Board or until, by mutual agreement, the parties have determined otherwise." And then we say that the parties are directed to embody these terms and conditions in a written contract reciting the intention of the parties to be governed by the order of the National War Labor Board.

Well, what then? Suppose the directive order is not complied with. At this stage, as at earlier stages, we inevitably engage in a good deal of mediation and persuasion. Conferences may be held with the parties about the directive order. We may then modify it a little if we can clear up difficulties without destroying essential equities. Very often the parties themselves will bargain out certain things that they have on their minds, and the process may and often does stretch over many, many months. If compliance cannot be brought about by this informal process of mediation, persuasion, and collective bargaining, then there are three possible courses we can take. One is to do nothing. That we sometimes do, but not officially, and always with the hope that compliance will ultimately come about. The second is to refer the case to the Economic Stabilization Director, under Executive Order 9370, issued last summer (1943), a course which up to now has not been pursued. That Executive order gave the Economic Stabilization Director power to call upon other Government Departments to apply whatever executive sanctions they had available in order to bring about compliance. We are about to have a joint conference of all of the agencies of the Economic Stabilization Director to explore this field. Thus far, it has not been used.

The third course is to refer the case to the President, and when that is done, the President normally takes over the plant through some appropriate Government agency. So far, out of some 6,000 disputes that have passed through the Board and the regional boards, we have had to send only 17 to the President—8 involving employers and 9 involving unions. This is a remarkable record, I think, when you consider that we have absolutely no legal sanctions for the carrying out of our orders.

I ought to add that before we send a case to the White House, we have a public hearing, a show-cause hearing as to why compliance is not being had. At that hearing, all sides of the Board do their best to try to bring about compliance, even though one or another side may rather violently disagree with the decision. We have had a rule since the Board was started that no matter how strongly members may differ as to a decision, once it is made it is to be supported 100 percent by all. That rule has never yet been broken. I think we touch here upon something very fundamental in the tripartite process.

THE TRIPARTITE SYSTEM

I have read editorials about the monstrosity of a tripartite tribunal being entrusted with judicial functions, with the interested groups participating in the decisions. It is argued that such a tribunal should be composed only of public representatives like a court. This argument overlooks the fact that the fundamental job of any system of justice is to make its decisions stick. No amount of sanctions will make any system of justice work unless, by and large, the great mass of people will go along with its decisions. *That is fundamental.*

Now, what do the courts deal with? The courts deal with disputes between individuals, and we find that they do very well indeed in handling such disputes. All the trappings of the court, the symbolism of the judge on the bench raised above the litigants, and the hundreds of years of tradition which have gone into the formalities of court-room procedure, are sufficient to bring about compliance with judges' decisions without the use of sanctions save in a very trifling fraction of cases. But courts do not have to deal, as the National War Labor Board must deal, with group conflicts, and right there is all the difference. In group conflicts you have all the pathology of war. You have one group ego pitted against another, with mass emotions, prejudices, and fears, which mankind knows least how to handle. In dealing with them the judge on the bench, with robes and bailiffs and all the weight of the past to support him, is ineffective. The forces confronting him are too powerful and the issues cannot be resolved by logic and precedent. I feel that very deeply. I feel that the only kind of system that in the long run, if it survives at all, can make its decisions stick in the field of labor disputes will be a body in which the opponents themselves have representatives, not direct representatives but spokesmen sufficiently removed from the immediate struggle to be capable of calm judgment and wise advice. These spokesmen will stand together 100 percent in loyalty to the enterprise, backing up its orders, once they are made, by going to their constituencies and saying, "Look, you don't like this, and maybe we don't, but you had your day in court, with us to help you; we did our best for you within the Board, but we got licked, and that is all there is to it. Now, you go ahead and live up to this decision." That is the key to the whole business.

If and when the tripartite structure of the National War Labor Board should break down, if the time should come when the loyalty of the industry or the labor side to the total enterprise should be so weakened by circumstances as to induce them to give up this function of theirs, then the Board would collapse and nothing nearly so effective could be found to take its place.

I am persuaded from having watched the Board in action for a little over 2 years that, serious as many of its mistakes have been—and

they have been many—far greater mistakes would have been made by a public court that did not have the benefit of the specialized knowledge that comes from having members around the table who include representatives of both labor and industry, participating in the deliberations and in the decisions. I am convinced that the business of working out rules for industrial relationships cannot prudently be entrusted to public members alone; and, indeed, I go along with the saying of Chairman Davis that it will be a great day in labor relations when industry and labor gang up together and kick the public off all the boards and settle their affairs by themselves.

Meanwhile the tripartite system has been building regional roots and developing people who should be capable of performing a very useful function in days to come after the war. There are many thousands of representatives of industry, labor, and the public who are working together as teams out in the regions all over this country, who are learning by first-hand experience what labor relations are all about. And I think that after the war that stock of trained human beings will be able to contribute a great deal to the development of industrial relations. Whether the Board's roots are deep enough to be permanent, and whether any vestige of the Board set-up will remain after the war, I don't know, but I do feel that the people it has trained may be of real service to the Nation in the years to come.

THE DEVELOPMENT OF REGULATORY PROCEDURES IN AGRICULTURAL MARKETING AND FOOD DISTRIBUTION

by
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THE Office of Distribution is charged with the administration of 25 separate laws related in varying degrees to the marketing of farm commodities. These laws are administered under the general supervision and policy direction of the War Food Administrator.[1]

The enactment of Federal legislation applicable to the marketing of farm commodities was begun about 1914. Prior to that time the work of the Department of Agriculture was devoted almost entirely to solving problems of production. Marketing had been regarded largely as a local problem, with some regulation and assistance by States and municipalities. With the rapid development of transportation, refrigeration, and large-scale production, especially of the more perishable commodities, producers had to seek markets farther and farther away from home.

Widespread confusion had developed in the use of terms for describing the quality and condition of farm commodities. Various State and trade standards had been established for some commodities, but they were not uniform and consequently were not adapted to long-distance transactions and to distribution on a national or an international scale. Various forms of abuse and unfair practice had arisen. The marketing of farm commodities in interstate and foreign commerce, therefore, was considered by the Congress as a proper subject for Federal legislation.

STANDARDIZATION AND INSPECTION LAWS

There is not time on this occasion to describe in any detail the functions and purposes of all of the marketing laws administered by the Office of Distribution. Many of these statutes are so-called standardization and inspection laws. They provide for establishing official standards of description and require official inspection and certification under certain conditions. The first of these laws was the Cotton Futures Act, which was enacted in 1914 and repealed and reenacted

[1] The War Food Administration was established within the Department of Agriculture in March 1943.

in 1916. Briefly, this Act requires that there shall be levied a tax of 2 cents a pound for each contract for future delivery made on any exchange, board of trade, or similar institution, unless the contract conforms to the Act and the rules and regulations of the Secretary of Agriculture for its administration. The tax need not be paid when the cotton delivered in settlement of futures contracts conforms to the official standards as promulgated by the Secretary of Agriculture and when such cotton has been classed and certificated by him. The Act also specifies the number of grades that may be tendered in settlement of futures contracts and the kind of information that shall be included in the contract. It requires that settlement shall be made in accordance with premiums or discounts established by the Secretary of Agriculture when cotton of other than the contract grade is delivered in settlement of the contract.

The authority to establish standards and require the classification of cotton in accordance therewith under the Cotton Futures Act applied only to futures contracts entered into on established exchanges. This authority was not applicable to spot transactions. Accordingly, in 1923 the Cotton Standards Act was passed. This Act also provides authority to establish official standards, makes it unlawful to describe cotton by grade in any transaction in interstate or foreign commerce unless the description conforms to the official standards, and authorizes the Secretary of Agriculture to classify cotton upon the request of any person who has a financial interest in the cotton and who may submit a sample for classification. The Act does not prohibit sales on the basis of individual samples, nor does it require official classification of all cotton sold in interstate or foreign commerce.

The United States Grain Standards Act was passed in 1916. This Act authorizes the Secretary of Agriculture to establish official standards for grain and requires the use of the official standards whenever grain is sold by grade. It does not prohibit the sale of grain by sample or by type, or under any name, description, or designation which is not false or misleading and which does not include in whole or in part the terms of the official standards. This Act goes further than the Cotton Standards Act and requires that grain shipped, delivered, offered, or consigned for sale by grade shall be inspected by an inspector authorized by the Secretary of Agriculture to inspect grain, provided the grain moves from or to a place where an official inspector is located. Thus, provision has been made for both permissive and mandatory official inspection. With respect to grain, inspection is mandatory under certain conditions, as it is for cotton delivered in settlement of futures contracts. Cotton not delivered on futures contracts, however, may or may not be officially classed, depending on the wishes of the buyer or the seller. For many other commodities, such as fruits and vegetables, dairy and poultry products, and meats, official inspection is mostly on a permissive basis.

In the Tobacco Inspection Act, passed in 1935, Congress has dealt with the official inspection of that commodity on a somewhat different basis. About 90 percent of the tobacco marketed by producers is sold at public auctions. The grading of tobacco requires a degree of skill which most farmers do not possess; consequently, they were largely at the mercy of buyers as to information regarding the quality of the tobacco they offered for sale. In the Tobacco Inspection Act, Congress did not require that all tobacco shall be inspected prior to sale at auction, but left that determination to be made by tobacco producers. The Act requires that before inspection shall become mandatory a referendum shall be held by the Secretary of Agriculture to determine the desire of tobacco growers with respect to inspection. When two-thirds of the producers voting in a referendum favor inspection, the Secretary of Agriculture may issue an order designating the market or markets to which the referendum applied. After such designation no tobacco shall be offered for sale on such designated markets until it shall have been inspected and certified by authorized representatives of the Secretary of Agriculture according to standards established by him under the Tobacco Inspection Act. At the present time all except 4 of the 140 tobacco-auction markets in the country have been designated for inspection, but, because of the manpower shortage, not all of those designated are inspected. Exemption in such circumstances is authorized by the statute.

Shortly after the passage of this Act, certain tobacco warehousemen in North Carolina challenged its constitutionality. An injunction was obtained in the District Court, the application for injunction being based primarily on three contentions: (1) That the sale of tobacco at auction is intrastate in character and therefore beyond the power of Congress to regulate under the interstate commerce clause, (2) that the Act is discriminatory in that its provisions are brought into operation on some markets and not on others, and (3) that the referendum provisions of the Act constitute an unlawful delegation of power. The Circuit Court of Appeals upheld the Government on all counts, and the Supreme Court also upheld the constitutionality of the Act by a decision rendered in January 1939.

ACTS RELATING TO UNFAIR PRACTICES

There is another group of laws the purpose of which is primarily to prevent unfair practices. Notable in this group are the Packers and Stockyards Act, the Commodity Exchange Act, the Perishable Agricultural Commodities Act, the Insecticide Act, the Warehouse Act, the Federal Seed Act, the Naval Stores Act, the Produce Agency Act, and some others.

The Packers and Stockyards Act, so far as packers are concerned, is a trade-practice act and, among other things, makes it unlawful for any meat packer to engage in or use any unfair, unjustly discrimina-

tory, or deceptive practice in interstate commerce. The stockyards part of the Act provides that all stockyards more than 20,000 square feet in size shall be posted by the Secretary of Agriculture. After a stockyard has been posted, commission men and dealers operating on such facility are required to register with the Secretary of Agriculture, setting forth the character of the business in which they are engaged and the kind of services they are in position to furnish. All rates or charges for stockyard services by such persons shall be just, reasonable, and nondiscriminatory. If any tariff filed by a stockyard company or a livestock commission man is considered by the Secretary to be unreasonable, he may issue an order of suspension and institute an investigation as to the reasonableness of the rate. Following investigation and a hearing, the Secretary of Agriculture may establish reasonable rates. In general, such rate investigations and procedures follow those used by public-utility commissions, and the procedure in rate-case proceedings is set forth in detail in published rules of practice. Another feature of this Act is the investigation of complaints of producers involving such matters as false weighing, incorrect application of tariffs, or other unfair practices. In the event the respondent is found guilty, the Secretary of Agriculture may suspend his registration or issue a reparation order, or both.

The Commodity Exchange Act restricts futures trading in grain, cotton, and other agricultural commodities covered by the act to such commodity exchanges as are licensed as contract markets by the Secretary of Agriculture. An exchange is licensed upon application and a showing that it complies with the statutory requirements relating to location, marketing conditions, availability of proper inspection facilities, and the maintenance of exchange rules to implement the provisions of the statute. The Act prohibits price manipulation and corners and provides for the establishment of limitations on excessive speculation that would cause artificial or unreasonable price fluctuations. It makes unlawful the dissemination of false or misleading crop or market information affecting prices, the cheating or defrauding of customers in connection with the execution of orders for the purchase or sale of commodities for future delivery, and the improper handling by futures commission merchants of customers' funds. It also outlaws the bucketing of orders, fictitious trades, and other improper trade practices. Futures commission merchants accepting orders from the public and floor brokers executing orders are required to register annually with the Secretary of Agriculture. Registrations are subject to suspension or revocation for cause, pursuant to notice and hearing. In addition to the criminal penalties provided by the Act, violators may also be denied trading privileges on all contract markets.

The Perishable Agricultural Commodities Act applies to fresh fruits and vegetables. It makes it unlawful for any commission mer-

chant, dealer, or broker handling fresh fruits and vegetables in interstate commerce to engage in such commerce without a license from the Secretary of Agriculture. The Act sets forth a series of unfair practices and authorizes the Secretary of Agriculture to suspend or revoke licenses. The Act authorizes the issuance of reparation orders by the Secretary of Agriculture. To ensure payment of such orders the Act requires that, unless the licensee against whom the reparation order has been issued shows within 5 days after the expiration of the period allowed for compliance with the order that he has taken an appeal to the courts or has made payment in full, his license shall be suspended automatically and shall remain in suspension until he satisfies the Secretary of Agriculture that the amount named therein has been paid, with interest.

The Federal Warehouse Act provides for the licensing and bonding of public warehouses engaged in the business of storing certain agricultural commodities. The primary purpose of the Act is to provide a warehouse receipt which will be widely accepted as collateral to loans as a means of facilitating the marketing of agricultural commodities. Licensing under the Act is optional with warehousemen, but after a warehouseman has elected to become licensed he is subject to severe penalties for violation of the Act and the regulations. Among the conditions prerequisite to a license are suitability of the facility for storing the commodities to be handled, minimum financial assets, ability to obtain a bond as prescribed in the regulations, and willingness to conform with the regulations.

The Federal Seed Act requires the labeling of agricultural and vegetable seeds shipped in interstate commerce. The label must show such information as the kind of seed, the percentage of weed seeds, and the percentage of germination. Before they may enter into the commerce of the United States, all seed imports must meet the requirements stated in the Act and the regulations.

THE AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

The statutes just mentioned deal for the most part with protection against unfair practices and with provision of marketing services which, if they are to be uniform and authoritative, must be conducted by an official agency. The Agricultural Marketing Agreement Act of 1937 represents a third type of marketing legislation and deals somewhat more specifically with marketing problems from the standpoint of income to producers. The declaration of policy in that Act states: "It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure, and that these conditions affect transactions in agricultural commodities with a national public interest and burden and obstruct the normal channels of interstate commerce." The

declaration of policy further states that it is the purpose of Congress "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period." While the word "parity" is not contained in the Act, the reference to the equivalency of purchasing power in a base period refers to the parity concept, although in the case of milk the Act is not limited to parity.

The Act authorizes the Secretary of Agriculture to enter into marketing agreements with processors, producers, associations of producers, and others engaged in handling any agricultural commodity or product thereof. The making of such an agreement is declared by the statute not to be a violation of any of the anti-trust laws of the United States, and it is also provided that the parties to such agreements shall be eligible for loans from the Reconstruction Finance Corporation. The Secretary of Agriculture may issue orders for the purpose of carrying out the declared policy of the Act.

While the law authorizes agreements and orders for a number of agricultural commodities, thus far it has been used chiefly by producers of fresh fruits, vegetables, and milk. In most of the fresh-fruit and vegetable agreements and orders the objective has been to bring about a more orderly flow by limiting the number of shipments, or by limiting shipments to specified grades or sizes. The primary objective of the agreements on fluid milk is to establish a minimum price to producers.

The use of the authority provided in the statute is not left solely to the will of the Secretary of Agriculture. Producers are given a substantial voice as to whether there shall be a marketing agreement or order, and also a voice in its administration, especially for fresh fruits and vegetables. A marketing agreement may be accomplished by the voluntary action of producers and handlers, in which case all are bound by the terms of the agreement. Such instruments are concluded only in rare cases. To make the purposes of the statute effective, therefore, provision is made for making agreements mandatory when certain conditions exist. For example, when a referendum shows that two-thirds of the producers handling two-thirds of the volume favor an agreement, but handlers of more than 50 percent refuse to concur, the Secretary of Agriculture, with the approval of the President, may issue an order making the agreement mandatory upon all. An exception is citrus fruit in California, for which approval for 80 percent of the volume and 75 percent of the producers is required. Persons subject to a marketing agreement may participate in its administration through the establishment of so-called control committees. This procedure is followed for fruits and vegetables. The law

limits the committees' powers to (1) administering the order in accordance with its terms and provisions, (2) making rules and regulations to effect the terms and provisions of the order, (3) receiving, investigating, and reporting to the Secretary of Agriculture complaints of violations of the order, and (4) recommending to the Secretary of Agriculture amendments to the order.

WARTIME REGULATION OF FOOD

During the Second World War the demand for food is almost insatiable. The efforts of the War Food Administration to increase food production to meet war needs are not germane to our subject today. Food production cannot be scheduled in advance as precisely as the production of ships, guns, and planes. It is susceptible to factors over which man has no control, such as the weather and other processes of nature. In a country the size of ours, with millions of producers, a variety of weather hazards, and highly concentrated producing areas separated by long distances from densely populated centers of consumption, making distribution complicated and costly, we see surpluses and scarcities existing at the same time, even in war years. This is particularly true of the more perishable food commodities. The over-all food picture, however, is that we shall need during the war and in the years immediately following it about all the food we can produce. The number of complicated problems of distributing the food supply for both military and civilian purposes has thrust the Office of Distribution into a type of wartime regulation which, from the standpoint of volume, transcends many times all of the older types of regulatory work, of which a few illustrations have just been cited.

The Second War Powers Act gives the President power to allocate supplies in such manner, upon such conditions, and to such extent as he shall deem necessary or appropriate in the public interest and to promote the National defense. These are the broad standards that must be followed in the allocation of food supplies. Authority for applying these standards has been delegated by the President to the War Food Administrator through Executive orders. The allocation process may be used when the shortage is actual or imminent. The allocation of short supplies of food is a matter of great magnitude and complexity. The first step is to allocate available and anticipated supplies among the various claimants—military and other war services, Lend-Lease, and civilians. Obviously this is a complicated process, involving great detail. Data, both as to production and requirements, must be assembled. Briefly, the process consists of budgeting and dividing our supplies to the best advantage for war needs.

After a commodity has been allocated or divided among the various claimants, we then have the problems of procurement and distribution. A variety of devices is used. For Government procurement, priority ratings may be assigned to contracts, purchase orders, or de-

liveries. Mandatory orders requiring production or delivery may be used and, as a last resort, needed supplies may be requisitioned. All these devices have been used.

Our interest today is concerned primarily with the so-called food orders. To date, a total of 96 food-distribution orders have been issued by the War Food Administration. These orders, which regulate the handling of commodities in various ways, have been implemented in more detail by the issuance of 227 orders by the Director of Food Distribution. They may be classified broadly into two groups: (1) Orders that contain restrictions on deliveries, inventories, sales, purchases, processing, distribution, and use; and (2) orders that require commodities to be set aside or reserved to fill war-purchase orders. Illustrative of the first group is the Bakery Order, which limits the maximum use of such critical materials as sugar, shortening, and milk; prohibits the former prevailing practice of returning stale bread; and limits the varieties of bread and rolls which may be manufactured. Another order in that group is one that restricts the consumption of fluid milk to a base period—June 1943—in order to provide more milk for the production of butter, cheese, evaporated milk, and powdered milk for direct war needs. Typical of the second group is the set-aside order on beef. This order now requires that 50 percent of the beef processed in Federally inspected plants, and which meets Army specifications, shall be set aside for Government purchase.

Similar orders have been issued with respect to butter, cheese, and rice. To obtain maximum production of raisins, an order was issued requiring that producers of raisin-variety grapes must convert them into raisins rather than sell them as fresh grapes. An order has been issued prohibiting the use of about 25 fruits in the manufacture of alcohol, and various orders have been issued requiring that fruits be made available for processing instead of being marketed in fresh form.

CONSULTATION IN THE FORMULATION OF REGULATIONS

All the marketing laws that have been mentioned arose from desires by certain groups for assistance by the Government. These laws were enacted to provide services and "rules of the game," which experience had demonstrated could not be done so effectively without the exercise of Governmental authority. The policy underlying the administration of these laws has been developed on the premise of service, to prevent violations by means of explanation, information, and warning, and to invoke penalties only upon the recalcitrant few. A law can be of greatest service when those who must live with it and abide by it have had an opportunity to assist in its development in the legislative stages, an even larger opportunity and voice in the formulation of the regulations which are to be used by the administrative agency, and a full and fair opportunity to present their side of a dis-

pute in any administrative proceeding, and when administrative decisions are reviewed by the courts. That principle has been followed with respect to the matters we are discussing today.

The principles and general outlines of many of these laws were discussed by different elements of the industries affected and by administrative officials before hearings were held by committees in Congress. In the formulation of regulations it has been the policy to provide an opportunity for interested persons to offer suggestions and comments before the regulations or important amendments to them are promulgated. Of the laws mentioned, only the Federal Seed Act requires that there be an opportunity to be heard before regulations and amendments thereto are issued. None of these laws, including the Federal Seed Act, requires a proceeding in the nature of a formal hearing prior to the promulgation of regulations. The general practice is to draft proposed regulations and to send copies to trade associations, trade newspapers and journals, and persons and firms on departmental mailing lists. At this time comments, criticisms, and suggested changes are invited, to be received by a stated time. In most instances, if the proposed regulations are new or are important amendments to existing regulations, arrangements are also made for hearings to be held at any one of two to six or eight places reasonably convenient to most of the people interested. These meetings are really public conferences, with no restriction on attendance or any particular formality of procedure. They are usually conducted by a representative of the administrative agency of sufficient rank to answer questions with considerable authority on administrative policy, procedure, and interpretation. The usual procedure in such conferences is for the presiding officer to go through the proposed regulations paragraph by paragraph, explain the purpose of each, and then permit questions and comments. Usually technical experts of the administrative agency are also present to take part in such discussions. Sometimes a verbatim transcript is made; at other times only notes are taken of important comments and suggestions. Usually a reasonable time is allowed following a conference for those so desiring to submit more detailed comments and suggestions in writing.

It has been our general practice, therefore, to provide public opportunity for persons subject to rules and regulations to express their views in advance of formal promulgation. This procedure could not be followed in connection with war-food orders. Since these orders are quasi-legislative in character, it would be desirable to follow such a course, and we would prefer to do so. But we are dealing with emergency conditions, which for the most part preclude, from the standpoint of time alone, the holding of hearings or public conferences throughout the country before the issuance of a food order. In some instances, as with set-aside orders, the result sought by an order might be seriously affected by advance notice of intention to issue such an

order, and some interests might gain an undue advantage over others by reason of having advance information.

To provide industry representation during the War, the Office of Distribution has established a number of Industry Advisory Committees. At present there are 107 of them. Each committee consists of representatives of large, medium, and small units in the industry, selected geographically so as to furnish a representative cross-section of the views of the industry. The creation of such committees has been approved by the Attorney General from the point of view of possible violation of anti-trust laws. The Office of Distribution appoints one of its employees as chairman, who presides at all sessions of his committee. The committees meet only on call of the Office of Distribution. Committee discussions include practically all problems confronting the industry. Representatives from other agencies are invited to participate when problems in their fields are up for discussion. Except for set-aside orders, it is the general practice to discuss in detail with the committees the proposed orders and the important amendments thereto. This procedure has enabled us to formulate necessary regulatory orders in the light of the experience of representatives of the industry concerned and from time to time to exchange views on problems of administration and enforcement. The committee device gives the Government men the benefit of the specialized knowledge of industry, and gives to representatives of industry a fuller realization of the wartime problems confronting the Government, and an opportunity to take part in developing ways and means for their solution.

VIOLATIONS

In connection with administrative action with respect to violations, most of the laws mentioned provide for a hearing or for an opportunity for a hearing. For example, licenses issued under the Cotton Standards Act, the Grain Standards Act, and some others may be suspended or revoked after opportunity for a hearing, with provision for temporary suspension without a hearing. The Federal Seed Act provides for three methods of enforcement: (1) Prosecution through the courts; (2) orders to cease and desist, and (3) seizure. Except for the Federal Seed Act and the Insecticide Act, no administrative proceedings, other than the necessary investigation and preparation of evidence for submission to the Department of Justice, are necessary when prosecution is used. The Federal Seed Act goes somewhat further, however, and provides that before a violation is reported for prosecution the respondent shall be given appropriate notice and opportunity to present his views. This is an informal proceeding and is conducted by an administrative officer. The only method of enforcement under the Insecticide Act is by prosecution, and notices in writing are sent, giving the respondent an opportunity to be heard prior to court ac-

tion. Hearings are required in connection with proceedings for cease and desist orders. These proceedings are more formal and are conducted by an examiner assigned by the Solicitor for the Department of Agriculture.

Under the Perishable Agricultural Commodities Act, three types of proceedings are used: (1) A proceeding to show cause why a license should be issued, under a provision of the Act which authorizes the denial of an application for a license under certain conditions; (2) disciplinary proceedings looking to publication of the facts or suspension or revocation of licenses; and (3) reparation orders. Hearings are required in all these proceedings, except that a hearing need not be held in complaints where the damages alleged do not exceed $500. By regulation, hearings may also be waived by the consent of the parties in cases involving more than $500 and not more than $2,000.

Under the Packers and Stockyards Act, cease and desist orders may be issued against packers after a hearing, and packers may be required to attend and testify. Reparation orders also may be issued only after a hearing unless hearing is waived. Licenses of live-poultry dealers may be suspended or revoked after a hearing, and applications for such licenses may be denied after an opportunity for a hearing. Hearings are required in connection with the issuance of rate orders. These proceedings are conducted by an examiner assigned by the Solicitor, with an attorney also assigned by the Solicitor as counsel for the administrative agency. In such proceedings, as in the case of most proceedings under other acts, specific rules of practice have been developed by the Solicitor and have been published for the guidance of all concerned. Briefly, these rules provide that the examiner shall prepare a report at the conclusion of the hearing and after the filing of briefs. Copies of the report are served upon the administrative agency and the respondent, who are given opportunity to file exceptions. After the exceptions have been considered, a draft of the proposed order is prepared. The draft is made available to both parties and opportunity is provided for oral argument before the Secretary of Agriculture, or person designated by him, before the final order is issued. The rights of the respondents are further protected by an opportunity to appeal to the courts.

Enforcement procedure for food orders follows the same general pattern outlined for other laws. Various administrative sanctions, including suspension orders, may be imposed for proved violations of food orders. Such actions are not considered penalties but are remedies to effect necessary adjustments in allocations of supplies. It is established policy that such orders are not to be issued without notice and opportunity for hearing. As a matter of actual practice, however, the Office of Distribution relies almost entirely for food-order enforcement on educational work conducted by its field representatives, in cooperation with industry and public agencies. When these means fail,

the aid of the courts is sought through injunction or criminal-prosecution proceedings. Such actions are preceded, as with other laws, by investigation to collect and prepare evidence for submission to the Department of Justice through the office of the Solicitor for the Department of Agriculture.

THE MORGAN CASE

The so-called Morgan case, under the Packers and Stockyards Act, attracted a considerable amount of attention among students of administrative procedure. This case involved the reasonableness of rates to be charged by livestock commission men on the Kansas City Market. The case was fought through the courts over a period of nearly 10 years. During the long-drawn-out course of this litigation, the District Court, the personnel of which was the same each time, rendered five decisions, three of them favorable to the Government and two unfavorable. The Supreme Court reversed four of these decisions and itself rendered five opinions, three against the Government and two in its favor. Briefly, the first appeal to the Supreme Court was on the ground that the respondent had never had a full hearing because Secretary Wallace had not given the case his personal attention. The Supreme Court remanded the case for further hearing on this point without passing on its merits. The second appeal to the Supreme Court was again on the point that the respondent had not had a full hearing. The Court found that there had not been a full hearing, its main reason apparently being that Secretary Wallace had based his decision on findings made by others. In a third decision, the Supreme Court denied the Government motion for rehearing and reargument but remanded the case for further hearing, largely to afford a basis on which to determine the distribution of the impounded funds. The lower court ordered the impounded money returned to the commission men but, on appeal by the Government, Justice Butler issued an order holding up its distribution. These matters were argued before the Supreme Court and the Court held that an order issued by the Secretary of Agriculture for a full hearing would serve as a guide for distributing the impounded funds. The last appeal to the Supreme Court was made by the Government from a lower-court decision, that there had not been a full hearing and that the order was not supported by evidence. In a final decision on May 26, 1941, the Supreme Court reversed the decision of the lower court and held that the commission men had had a full hearing.

As a result of the Morgan case, the Secretary was authorized by the Schwellenbach Act of 1940 to delegate to not more than two officials of the Department any regulatory function with which he is charged.

Under the Agricultural Marketing Agreement Act, a detailed procedure has been devised to protect the rights of the parties affected by marketing agreements and orders. Each marketing agreement and

order is preceded by a hearing. It may be of interest to note the following 12 steps taken in formulating marketing agreements and orders, or amendments to orders, with respect to milk:

1. Application from industry requesting the Secretary of Agriculture (through the War Food Administrator) to hold a hearing.
2. Investigation of the merits of the application, instituted by the Director of the Office of Distribution.
3. Recommendation by the Director of the Office of Distribution to the War Food Administrator that a hearing be held.
4. Approval of a hearing and serving notice thereof by the War Food Administrator.
5. Holding of the public hearing.
6. Preparation and filing with the hearing clerk of a report by the Director of the Office of Distribution on the hearing, together with a proposed order or amendment.
7. Filing of exceptions to the Director's report.
8. Recommendation by the Director of a marketing agreement for tentative approval by the War Food Administrator.
9. Approval of the agreement by the War Food Administrator.
10. Holding of a referendum among producers and submission of a marketing agreement to handlers.
11. Approval by the President (through the Director of Economic Stabilization) if handlers of more than 50 percent of the volume of milk in the market refuse to sign the marketing agreement.
12. Issuance of final order or amendment by the War Food Administrator.

CONCLUSION

From the brief description that has been given of a few of the laws administered by the Office of Distribution, it is apparent that their objective is to facilitate the marketing of farm commodities and to prevent abuses in the marketing process. Food orders must be regarded strictly as war measures. Perhaps the main purpose of administrative agencies is to provide a means for preventing evils from developing, rather than merely trying to correct them after they have arisen. Congress may declare a certain act to be a crime. The mere declaration on the part of Congress may serve as a deterrent. Sometimes that will be sufficient, but often it is not. Individuals may go into court and sue each other, but that procedure is usually expensive and time-consuming, especially when the parties to the dispute are separated by long distances. Results are uncertain. A more flexible method is needed. More than 2,000 complaints are received each year under the Perishable Agricultural Commodities Act. Less than 10 percent of these complaints get as far as a formal hearing. The advice of the administrative agency, based on decisions in similar circumstances, disposes of the others and provides the protection sought by the Act.

The administrators of such laws have an important responsibility. A policy of arbitrary and unreasonable administration can ruin a good law and cause it to fail in its purpose. On the other hand, a realistic policy based on an understanding of the conditions under which business must be carried on can do wonders, even with a weak law.

The marketing of farm commodities, in their natural and processed forms, is a vast and complicated process in this country. The laws mentioned deal only with specific phases. Generally speaking, an efficient system of marketing has been developed; but it is always open to criticism, especially in times of stress. When prices are generally unsatisfactory to producers, they allege unreasonable costs of distribution. Consumers do likewise when their incomes are comparatively low. There is room for improvement, and always will be. It is just as important to strive for higher efficiency in distribution as it is to work for greater efficiency in production. It is reasonable to expect, therefore, that producers, distributors ,and consumers will insist on such additional assistance as the Federal Government is able to render through regulatory and service measures involving the use of the administrative process.

REGULATORY PROCEDURES IN THE OFFICE OF PRICE ADMINISTRATION

by

JACOB ROSENTHAL

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THE Office of Price Administration consists of five separate departments—a Price Department, a Rationing Department, a Rent Department, an Enforcement Department, and an Administrative Department. OPA has 55,000 paid employees and about 141,000 volunteer workers operating out of the National office and 93 district offices. We have some 6,000 commodity groups to be concerned about, and upwards of 8,000,000 individual-item prices. About 3,000,000 businesses as such are directly affected by our regulations. That gives you some idea as to the tremendous nature of the job OPA has undertaken.

I do not propose to spend very much time discussing our rationing operations, because they are relatively smaller than our price operations, and you are already familiar with most of the rationing mechanics. As to method of operation in connection with rationing, you are familiar with the fact that supply agencies, such as the War Food Administration in connection with food, determine the basic policies of production, distribution, and supply. Actually, so far as rationing is concerned, OPA is hardly more than a service organization. I think the reason why rationing as such has been kept in OPA is that fundamentally rationing is a local-board job and OPA has had available a set-up of rationing boards staffed largely by volunteers, and over a period of time I think we have achieved an efficient, enthusiastic, and self-sacrificing organization of patriotic volunteers who are doing excellent work. There are 5,400 such local rationing boards throughout the United States.

Before leaving the subject of rationing, I should like to indicate the main nature of the regulatory task and our hope for improvement in the work we are doing. First, I think, comes the simplification of the wording of the regulations. In my own industry, the coffee industry, there were some 56 pages of them. I think we have improved since the earlier days. One of the next steps on our program is improvement of the ration banking system, under which the commercial banks are used for clearing the ration coupons. I am very much afraid that our early record in consulting with affected groups has not been very good. The industry knew nothing about coffee-rationing plans, for instance, until they read about them in the newspapers one morning. Finally, there is need for eliminating confusion and perplexity among the general public. So much for the subject of rationing.

The problems of the Price Department arise from four major sources:

1. Application of an industry for a price increase.
2. Certification by a supply agency, such as the War Production Board or the War Food Administration, that an existing price ceiling constitutes an impediment to supply.
3. Complaints that a particular price level is too high.
4. Action initiated within OPA to correct a set of prices upward or downward or to improve price control in a particular field.

It should be noted that our problem has changed in this respect. Originally it was to cover the major fields with price control as quickly as possible and not to neglect any action that would leave ungoverned any field where prices should have been controlled. Today, however, with 550 price regulations governing general industry and with additional regulations in the rent, services, and transportation fields, there is very little area in our economic system that is not covered by price control. As a result, price action today is mainly concerned with amendments, adjustment, and the handling of applications for price increases.

Obviously, the first step is to get the necessary facts on which to base a decision. This is probably the greatest problem, the most difficult one, and the greatest source of interminable delay. One reason is that most industries *as industries* do not have the information in such form as to satisfy the criteria of the Price Control Act, and the laborious process of an accounting study must be undertaken. In that field we work very closely with Industry Advisory Committees and we are very free and frank to discuss with all industries and all groups of individuals the general nature of our problem, the factual information we have, and our general conclusions from the facts. The next step in procedure is usually through staff meetings to arrive at a preliminary decision as to policy in relation to the particular issue.

In connection with all our regulations we are required to issue a full public statement explaining in detail the considerations that underlie the particular price action. Usually that statement is prepared by an economist. Then the process of drafting, clearing with other agencies and within OPA, settling differences, consulting industry, and getting the mechanical work done must be gone through. Any or all of these steps can mean serious time-consuming delays. Sometimes that is pretty serious.

In connection with our procedure, you may be interested in a brief discussion of the general nature of our control. There are, basically, three types of price-control techniques in practice. One is a freeze technique, in which we freeze prices at those prevailing during a particular base period. An illustration of that is the General Maximum

Price Regulation. Second, there is the formula technique, by which we provide a cost formula, allowing an industry to compute its own prices on the basis of clearly defined cost allowances, which they are permitted to include. Finally, we have the technique of flat pricing, which involves our making a survey of an industry and deciding that a specific price, say $2.45 per case for particular canned goods, is a fair and equitable price, generally, for the industry, and we publish it on that basis. There are, of course, defects and advantages in all three methods. I do not propose to go into them, but it may help you to have that general background.

I want also to refer to the question of standards. I think it might be helpful if I indicate briefly the nature of our policy standards.

We have to fix industry earning standards. We are required by law to give a price increase for an industry under circumstances where the facts show that the prices in effect result in earnings below the normal peacetime earnings for that industry.

We feel that we are not required by law to give an increase where the general earnings are at least at the normal peacetime earning level. Our standard in connection with that is a little tight. We argue that if an industry is making over-all profits better than the normal peacetime standard, the mere fact that they are losing money on a particular product is not enough justification for a price increase. However, we do say that if they are losing money to the extent of an actual out-of-pocket loss, we give them a price increase for what we call direct cost, that is, actual outlay, but no factory overhead, no selling overhead, and no profit. Our argument is that there never was a time in the history of American business when every company made a profit out of every product it handled.

We have two other general criteria. If the War Food Administration certifies to us, for example, that the output of the starch and corn-meal industry is essential and it wants to have the industry operated at full capacity, obviously we have to do what we can, price-wise, to assure capacity operation. Finally, we have an individual-adjustment procedure which takes in certain catch-all problems. However, we try to limit it pretty strictly to circumstances where financial hardship is experienced and where a low-cost seller or a low-price product is in danger of being forced out of the market, compelling consumers or industrial buyers to pay a higher price. By this means, we feel that we are assuring lower prices, not increased prices.

So far as our relations with the people we regulate are concerned, we follow a procedure of consulting industry advisory committees. I might say that OPA in its early days did not do this to the extent some people considered desirable. We had to work too fast. Today, however, it may interest you to know that OPA is the only agency required by law to consult with industry before issuing regulations. Some of our friends in industry, unfortunately, interpret that to mean that we

must get their approval for the prices we are going to put into effect. We, of course, do not interpret it that way.

There are two general things we can and do discuss very thoroughly with advisory committees. One of them is the nature of the facts we will get to determine the justification for price action. The other is the nature of cooperation by industries in helping us get the facts.

We are having quite a problem in OPA to decide under what circumstances OPA itself will gather the information, and under what circumstances we will have industry gather the data for us. Generally, I might say, we prefer the former. We have found that unless we send out investigators we don't get the facts as we need them. Even a questionnaire doesn't give them to us accurately. When an industry itself gathers them, they are that much less satisfactory. However, as a practical matter, we haven't anywhere near enough research accountants in OPA to do this work, and we have to accept a good deal of the information as it is presented by industry.

In addition, we can and do discuss in these meetings industry practices, basic policies, regulations, and established differentials, but among the things we are naturally precluded from discussing are the exact nature of the price schedules we propose to put into effect and the exact level of prices. There is a good deal of criticism on that policy, but you can understand that the committee members would have an unfair advantage if we gave them definite advance information on the prices and details of the regulation. In other words, the mere fact that the regulation might not invalidate existing contracts, might cause companies to have contracts made to cover a whole industry by the time we got the regulation out, so we have to keep items like that definitely confidential in our relations with the committees.

We now have about 440 advisory committees. In a recent 5-week period, OPA held a total of 2,500 meetings, both formal and informal, in Washington, and in the field.

In organizing industry advisory groups we try, as I know the War Production Board and the War Food Administration also do, to make the committees completely representative not only geographically but also as to the size of companies represented, the type of operation, affiliation and nonaffiliation with trade associations, and in other respects.

As I have indicated, our position is unique in that we are required by law to set up these advisory committees. The law has done two things that are sometimes embarrassing in the operation of the committees. One is that the committee can elect its own chairman. The manner in which a matter is presented and a meeting is presided over makes a big difference in the contribution you get from that meeting. Even more important is the fact that under our law the committee can first meet by itself and can definitely determine whether a con

ference with the OPA should be held. You can understand that in some cases it may be very inconvenient for meetings to be held at a certain time; if they were held a little later, we might be in much better position to work with the committee. We have to work under that set-up because of legal requirements. The War Food Administration and the War Production Board are fortunate in not having to operate in that way.

We also have a labor advisory committee, which is one central committee consisting of representatives of the Congress of Industrial Organizations and the American Federation of Labor. They have representatives in OPA. We keep them fully informed of pending actions and give them an opportunity to express their opposition or their approval.

Public representation is very difficult to arrange from a practical standpoint. I suppose those of us who work in OPA, whether we are accountants, lawyers, or price officials, consider ourselves the bulwark for the general public in the prevention of inflation.

On the subject of appeals and reviews, we do not have a set-up which permits the type of appeals committee that exists in the War Food Administration and in the War Production Board. You can appreciate the fact that, once a price regulation has been issued, to allow an appeals committee to determine that our price policy should be changed in a particular instance would almost upset the entire operation. We do, however, provide for hearings and industry presentations and complaints against the nature of the regulations, either in advance or after they have been issued. These hearings are held before the Director of the Division of the Price Department concerned, before the Deputy Administrator for the Price Department, or, finally, before the Administrator.

You have probably heard a good deal about our proceedings, to the effect that there is no satisfactory means of getting a proper review of appeals. The general procedure, when the Administrator has finally decided he will put out a price regulation against the wishes of an industry, is for the industry to file a formal protest. We have 60 days in which to reply. If we deny their formal protest, that gives them formal clearance to go to the Emergency Court of Appeals, a special court established by the Emergency Price Control Act of 1942. This court has power to set aside regulations, orders, or price schedules issued by the Administrator if it is shown that they are not in accordance with law or are arbitrary or capricious. The court consists of judges of the United States District Courts or Circuit Courts of Appeals designated by the Chief Justice of the United States. Decisions of the court may be reviewed by the United States Supreme Court.

The Emergency Court of Appeals has exclusive jurisdiction with respect to OPA regulations, orders, and price schedules. This is a very necessary provision, for you can appreciate what would happen

to us if 93 different Federal District Courts gave out conflicting rulings on the same price regulation; rulings which, because of interstate commerce conditions, apply all over the country. You would have the worst kind of confusion, you would have the worst kind of litigation delays, you would have part of an industry under regulation while another part of the same industry would be out of it. It would result in momentary and serious shifts in materials, manpower, and facilities to areas not under control, and price control would be over before you could get a single rational decision as to what the situation was.

I might say that the Emergency Court of Appeals does give anyone who protests an opportunity to be heard in his local community, if he prefers that the case be heard there; and it provides a single national tribunal that will give him an immediate decision, and not permit areas of conflicting jurisdiction and confusion to exist.

In the field of enforcement, we in OPA probably have the worst problem that faces any government regulatory agency. The number of employees in the Enforcement Department is slightly less than the number of counties in the United States. We cannot, therefore, do a comprehensive enforcement job. We have to depend on voluntary compliance, and unfortunately, such compliance is most difficult to obtain in economic regulatory procedure of this type. I am very much afraid that American business, the American farmer, and, for that matter, the American public, have not come to the point of recognizing that violation of an economic regulation essential to our country in wartime is just as anti-social, probably worse in its effect, just as immoral, and just as reprehensible as a violation of the regulation against stealing. And until we get a better moral perspective of economic regulations on the part of our decent citizens, we are going to have that difficulty.

We have two fairly unique procedures in OPA in which you might be interested. One, which is in connection with rationing, relates to the so-called hearing commissioners. We have set up in the various district offices a hearing commissioner who listens to the evidence which our investigational people have been able to get on a violation and who decides whether we shall take it to court, whether we shall settle out of court, on the basis of treble damages or a fine of ration points, or whether the case should be closed.

In the field of price control, we have something unique, and that is our price panels. Each one of the 5,400 War Price and Rationing Boards has at least one price panel, consisting of a paid secretary and volunteers. There are about 20,000 regular volunteer workers and about 40,000 part-time employees. The panels provide education and information on regulations and changes in regulations to both retailers and consumers, and they operate to obtain full compliance with regulations. The panels administer certain specific dealer and price-

control activities, like the receipt and checking of price lists from restaurants. They also collect data and information. Price-panel workers are sent out regularly to check up on retail stores. They also handle, in the first instance, consumer complaints about prices. You would be amazed at the number coming in to us—hundreds of thousands every month. Price panels also have advisory committees from the trade who sit in on hearings or advise and decide which cases to turn over to the Enforcement Department. The panels operate primarily and most successfully in the retail field. I might say that this procedure has been very helpful to us in our trade and public relations.

One of our major problems in regulatory administration is that of field versus centralized administration. Chester Bowles, when he came in as Administrator, made it one of his cardinal policies to decentralize OPA activities. Of course, it was easier for him to do it than for Leon Henderson, his predecessor, because in the early days of establishing price control all you could do in the field was to keep people informed. However, now that the problem is amendment, improvement, simplification, education, and enforcement, we are able to do a much better job in the field of administration. Generally speaking, we delegate to field offices power to administer specific types of regulation and to permit price increases under certain carefully prepared criteria. For example, in our Services Division we have almost complete delegation to the field of the control of restaurant prices, laundry charges, and various services of that kind. Rent control is also on a decentralized basis.

When authority is delegated to field offices in this way, the basic regulation is issued from Washington, criteria under which increases may be given are established, and then the field has complete jurisdiction over the administration of regulations of that kind.

I think I have spent enough time explaining how we in OPA look at the problem of regulatory administration. Now I would like to spend a few minutes on something which, to me, is even more interesting and has broader repercussions: How do we look to the people whom we are supposed to regulate?

I think I have had a unique opportunity to learn something about that problem, because in between sentences as a government administrator I spend a good deal of time as a business representative here in Washington. I might say that when I am a government administrator I never fail to be angry about the activities of some of my business friends, and when I am in the field of business I never fail to lose my temper about the attitudes of some of my friends in government administrative positions.

Of course, there is one thing you can understand about the average businessman: He is a human being, and if you have ever been present at 6 o'clock in a cocktail lounge with groups of representatives of

industry who come down here, you realize how important the simple facts of human nature are. One of these representatives will mention that he had a conference with a minor government official, "Someone I would probably refuse to hire as an office boy, and he had the nerve to tell me *I* will do this and *I* will not do that, just as though he were the United States Government all by himself." That, of course, is where we encounter the problem of bad manners, and the problem of personality and attitude of government officials. I do not think it is possible to exaggerate the influence of personality in governmental administrative work, in its effect on the attitude of the average businessman and on the industry being regulated.

Of course, one question that we have in that connection is the problem of morality. You and I know that some business men have some very elastic ideas in connection with what is proper. Probably that is unavoidable when you consider the nature of the risks that the average businessman takes and the obstacles he has to overcome in making business a success. It is understandable that he will be rather aggressive and in some of his activities may go over the line of what we consider proper ethics and procedure. I suppose it is pretty much like the sex urge. We would not have perpetuation of the race unless the sex urge were strong enough so that sometimes it does run over the line of what society sets as the proper procedure.

One thing, however, is quite clear—businessmen refuse to forgive any chicanery on the part of the government administrator. They insist on a double standard of morality. Personally, after some years of experience in this field, I have come to the conclusion that they are probably right, they are right in their feeling that the United States Government should set a standard of honor, a standard of morality in dealing with economic matters. Even though control may be weakened thereby, it is probably a small price to pay for group morality and for the elimination of trickery in administrative procedures.

One other thing of great importance is the fact that all of us who are in government administrative regulatory jobs are actually playing God in a great big way. At least, we occupy that role so far as the businessman who comes here and over whom we have major powers is concerned. I think it is a peculiar fact, that if a businessman feels we are enjoying playing God he is terrifically antagonized by it; on the other hand, if he feels we are humble in our job, I think we have an opportunity to get a tremendous amount of cooperation.

I might say that this general feeling involves what should be much better understood by the people who write and administer regulatory actions. Just what makes an administrative official successful? I think the main requirement is the ability to achieve the governmental purpose with the least antagonizing effect on the citizens regulated. It has been said about a certain government official that he could antagonize a group of people more by giving them everything they asked

for than other officials could by a complete refusal. The only sound approach lies in trying to get an understanding, in trying to recognize the problems that you have to deal with, and not merely in exercising the authority you have, just because you have it.

Now, before concluding I would like to discuss very briefly a few criticisms of OPA regulatory policies and procedures, namely, the things my friends from industry are now complaining about to Congress; then I want to spend a few minutes on some general problems of administration.

We have been criticized because the industry's earning standards require that we raise prices only to assure that they are *generally* fair and equitable. Industry wants that word "generally" taken out, so that we would be required to make the prices fair and equitable to every individual company and applicant. Of course, that would simply wreck price control, because there never was a time in the history of the country when any particular price level did not mean that somebody was making no money, and somebody else was making money; and if we are required to make every price fair and equitable to every individual we might as well close up shop and go home.

Our profit standard has been criticized. Businessmen feel that it is unsound to have an individual product on which they are not making a profit. Of course, the answer is rather obvious. I don't think any of my business friends would stand up and tell me, considering what I know about their operations, that, even when they were completely free, they ever had a situation in which the price on every individual product was entirely satisfactory.

Criticism of personnel may be justifiable. Mr. Bowles has tried to bring business administrators into OPA, and he has succeeded to some extent, but it is difficult to get businessmen who are willing to make the sacrifice of working for $5,600 or $6,500 a year when they are making $25,000 in industry. And we don't want to hire someone to whom $6,500 is an attraction; therefore we are faced by a very serious dilemma.

Likewise, criticisms have been made with respect to delay, and to some extent they are justifiable.

I think you are familiar with the criticism of OPA on something we are desperately trying to improve now which, originally, represented a very serious mistake, and that was when we forgot the fact that merely setting a maximum price and holding the line did not prevent price increases. For example, in the field of my own industry, coffee, that line has been held beautifully. Probably that has been one of the best examples of the benefits of price control, for there has been no change in prices since March 1942, and none in green coffee since October 1941. The only trouble about it is that the least profitable brands have disappeared from the market, and the more profitable ones have stayed. That is a condition which applies in

textiles and many other materials. I think the basic concept of holding equally all along the line was the concept that was wrong and was the source of error. Hindsight, I suppose, is easy; but in the early days it would have been better to have offered a profit incentive to maintain low-price items.

Now, so far as the general problems and general considerations are concerned, unfortunately this field of regulatory procedure is rather new, and yet the points I am about to mention are extremely vital for study, and for discussion as a basis for improving our activities.

First of all, what most government administrators have failed to realize from the outset is that once we regulate even partially, whether we like it or not, whether we accept it or not, whether it is justified or not, we are charged with responsibility for everything that happens in that field. Normal losses, normal delay, normal problems which would be taken by an industry in its stride and should not create any regulatory problem immediately become problems for the OPA or the Federal Government in general. To give you an illustration, we will have in corn distribution some serious difficulties because of shortage of corn. Normally, that happens occasionally and the industry takes a substantial loss by reason of that fact. Now, if OPA is in the picture, however, the problem is altered. We are supposed to do something about prices to prevent their losses. You can multiply instances of that kind far into the night. I think it is an important point for us to keep in mind in drafting our regulations, that we try to clarify the point to which we will accept responsibility in our regulations and the point at which we refuse to accept responsibility for what happens in a particular industry. I might say that, from one standpoint, government regulation is a godsend to industry.

Many businessmen today are very shortsighted when they deal with commodities that are in short supply; they find they can get almost anything done by their customers and they have disrupted the channels of trade through which they normally work. To give you an illustration, we have butter rationing and butter-price regulations. The primary distributors in the New York market find they can sell to customers without wholesaler intermediaries and without any trouble to themselves. The customers would stand in line to cut it themselves and pay the retail prices. Because of the distributors' going direct to the retailers, we even have cases of chain stores accepting deliveries in their individual stores and paying a much higher price than they ever paid before. Invariably, OPA is being blamed for that condition. The wholesalers who are being forced out of business blame it on OPA. Actually, OPA has no responsibility for it. What the wholesalers ask us to do to keep them in business is to cut their normal mark-up, which they originally considered was the minimum on which they could live, and give an increased part of that margin

to the primary distributor, not because it is desirable economically, but because it might keep them in business.

Now, we have area after area where OPA takes the blame from industry because of disruption of channels of distribution due to the short-sighted selfishness of a particular group that is trying to get part of the next channel's margin. Our alternative, frankly, is not very satisfactory. The only way we could solve that is by freezing all channels of distribution, yet we feel that would be unfortunate from the standpoint of the general set-up of the distribution system.

Another general problem is the determination as a matter of general government policy of what you do in an area where, if you write a regulation, it is difficult or impossible to enforce it. One illustration of such a circumstance happened when I was in War Food Administration. We were very much concerned about restaurant conditions. We were told that people were able to get all the steak they wanted for $10, and in 10-course dinners, while food shortages were being publicized throughout the country. I was asked to investigate the possibility of writing a restaurant regulation to limit the number of courses, and the size of portions to indicate to the public that we were trying to distribute food in restaurants equitably. It became clear that such a regulation would be thoroughly unenforceable; yet the issue arose, should we write something unenforceable to give an indication of our intention to the general public, the greater part of which complies voluntarily as law-abiding citizens, or was it better to leave that field completely unregulated? I haven't an answer for that question. Yet we have to have an answer, because many citizens take the attitude that unless their government by a definite statement or regulation indicates the general policy they are to follow, they are free to do as they please. For example, if they are hoarding coffee they feel they are not being unethical or unpatriotic unless a regulation or rationing order warns them not to.

One final point as to the attitude of businessmen subjected to our regulations: An understanding of just what will help a businessman and what will hurt him is extremely important. To illustrate, we in OPA had a fight about whether we should have formula or flat pricing for canned goods for the 1944 pack. Of course, there are many important questions involved as to the levels we will set, but the important point is that if we were to flat-price the canning pack it would mean that we had to substitute our own economic judgment for the thousands of individual differentials or the thousands of individual circumstances built up by businessmen over 150 years in that industry. Frankly, I can say to you, from an economic standpoint, that might be a good thing because some of those differentials are economically unsound. Yet I think it would be a poor policy. The businessman resents any individual or group of individuals attempting to substitute their judgment for the millions of individual negotiations, transac-

tions, and agreements of various and sundry kinds that went on for over a hundred years, to achieve what represents at least a stable, dependable system of differentials. It may be that any one of us could write a set of differentials which would greatly improve the economics of that industry, but I think the price we would pay in trying to do so would certainly not be worth the objective we would gain. That is true in a number of fields.

All of our businessmen have islands of security. Actually, there is nothing the average businessman likes less than competition. The only reason he stands competition is that each one tries to build up in his own company certain islands of safety, which may take the form of faith in a certain particular product, or in certain particular anchors, that he feels none of his competitors can have.

To give an illustration, in many industries there is a certain amount of leeway for variation in grade and quality that can only be determined by tests of personal taste. It is amazing how somebody has one idea of quality when he is buying a particular product and how the product suddenly improves as he sells it within a few days. Generally speaking, it makes only a slight difference price-wise; yet that is probably the thing the average distributor will depend on for his profit throughout the year. I am sure you could write a regulation forcing the man to lose money outright which would receive a less vehement reaction than interference with a minor practice like that in the field of one of his islands of safety. Generally speaking, in OPA and in other agencies it is well for us to know about these islands of safety, but sometimes just to leave them alone would permit us to be tighter in our control in other fields.

My purpose in mentioning some of these factors was not to be exhaustive in discussing any of them, but rather to indicate some of the fields in which a proper study of some generalized aspects of the regulatory problem would be of greatest importance.

My final point is that we in OPA are looking forward with eagerness, I might say with almost passionate intensity, to the time when OPA can be abolished completely, without leaving a trace.

REGULATORY PROCEDURES IN THE WAR PRODUCTION BOARD

by

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I THINK it is well to recognize at least two different types of regulation. The first is that which is carried out by such agencies as the Interstate Commerce Commission, the Securities and Exchange Commission, and the Federal Trade Commission. It consists—shall we say?—of protection of the public interest against the misdirection of the use of private power. Under our economic system, where there are individual rights and public regulation, the assertion of the public interest through regulatory practice becomes a very important series of steps. This type of regulation, however, is entirely different from the direct government control of economic activity. The two most common ways by which the Government has carried out direct economic control are through the actions of the great Federal corporations, which have produced or contracted for production, on the one hand, and on the other hand, the regulatory agencies such as the Agricultural Adjustment Agency, the War Production Board, and the War Manpower Commission, which are concerned with the control of production by private producers.

The economic objective of the War Production Board was organization of the economy for war. That task is, of course, all-inclusive in these days when war actually involves all our economic activity; but the basic job here of organizing an economy was one that had to be done. If one thinks back philosophically over the experience here during the war, and remembers the successive agencies that have come along, he realizes that none of us knew just how to adjust the various agencies to the job that had to be done.

I remember attending a series of conferences before any of the wartime agencies were set up, when a scheme was drawn up for the Federal agencies which, it was anticipated, would be needed. I think we now have had the number then decided on and more. The interesting thing is that here was a pattern of regulation which it was possible to foresee; it was not, however, possible, no matter how logical you were, to lay down in advance specifically the way the regulation was finally going to materialize. This was not something that could be worked out by logic; it was something that could be worked out only by the hammering of administrative action against the hard facts of economic life. And so I sometimes get a little bit impatient with those who seem to feel that it is possible to set up a purely logical, *a*

priori administrative scheme and have it fit an economy. An economy isn't that kind of thing; it is a living, growing, vital organism of which we are all a part, consisting of all the great business organizations, small business organizations, homes, and what not.

It was essential, then, that somebody apply an over-all regulation to the economy. We finally achieved an Office of War Mobilization. But, you remember, we also have an Office for Emergency Management, and much of the same thing went into the set-up originally of OEM which finally developed into OWM. Logically, it was almost the same institution, and yet they had to work their way through a whole series of activities before OWM finally became the powerful directing force it now is.

In the meantime, we have hammered out other economic control agencies. I would like to refer to three of them. These are the War Production Board and its predecessor agencies, the Office of Price Administration as the great price-control agency, and the War Manpower Commission. It seems to me that any one of these three might very well have been *the* agency that organized an over-all control, because all three deal with over-all factors, rather than with some segment of the total operation. Materials and facilities in the War Production Board, manpower in the War Manpower Commission, prices in the Office of Price Administration, all these control management—that is, private management, which operates most of our economy.

These agencies control the production side of the job, but the demand side is just as important. Now take a look at that side of the picture. Where do we find the demand against this economy? Again, it is a wartime demand. And the over-all wartime demand is something that has to be thrown over against these over-all wartime regulatory agencies which control the factors of production. First, of course, there are the demands as presented by the Combined Chiefs of Staff. I purposely speak of the Combined Chiefs, rather than the Joint Chiefs, because this is an international demand on our productive facilities. To that must be added also on the military side the demands represented by the successive Russian Protocols. Here is the military demand. Beside that must be set the demands of the civilian economy. So long as the military demands made up a relatively small part of the demand on the economy, over-all economic controls, such as the ones we have developed, were not necessary. You can always allow a small part of the economy to take care of itself, but not a big chunk. In this case we are talking in terms of half of our economic potential. The other half is approximately what we are today giving to the essential civilian economy.

Now, when you take that much—half of the economy—and direct it this way, you have a control job of no small magnitude. And it is not sufficient to control just the half that goes to what I would call

the military requirements; you must control the other half or you are not going to get the military half. This was the problem that for a long time baffled our organizational administrative experts.

The first solution that we tried in the War Production Board was the device popularly known as "PRP," the Production Requirements Plan. This, at a later stage, was modified into the present machinery of the Controlled Materials Plan. I want to discuss the Controlled Materials Plan because it is still the central part of the control mechanism of the War Production Board. The theory of it moves from total requirements to total control of production. However, the control of all production is a job too big, too complicated, to be undertaken by any central agency, and so you have to operate by proxy. The proxies chosen were steel, copper, and aluminum.

Most of you, I am sure, are aware of the extent to which steel is a common denominator in all of our economic activity. To measure the economic strength of a nation in terms of its steel-production capacity is not unusual; but why pick copper, and why pick aluminum? Copper is chosen primarily because of the very large part it played in ordnance, and aluminum primarily because of the large part it played in aircraft. So we have steel, as the common denominator for the general economy, copper for ordnance, and aluminum for aircraft. That was not going to be sufficient for all purposes, but for the general proxies those three were adequate. Here we had to recognize that there are again two types of basic demand against the economy. The one consists of those demands made by what we will call the procuring agencies, while the other represents the demands made on the economy in anticipation of demand. To be concrete about it, the Armed Services know what their contracts are going to be, and the Maritime Commission knows what its contracts are going to be. Those contracts can be accurately estimated, and by a series of conversion ratios it is possible to compute the amount of steel, aluminum, and copper that is going to be needed. That takes care of one big chunk. The remaining requirements are much more difficult to estimate.

Our central machinery consisted of bringing together in one spot the estimated requirements for steel, copper, and aluminum for a given future period. This involves, as you will immediately see, the computation of time lags and margins of error, which are anything but simple. We also had to have a forum in which the claimant agencies, that is the government agencies responsible for the different segments of military and civilian supply, could come together and present their claims, in which the marginal questions that have always to be decided could be argued out. This piece of machinery, as most of you know, is called the Requirements Committee. The Requirements Committee, in most ways, is the heart of the War Production Board's functions. Originally, it gave its attention primarily to the

quarterly allocations of steel, copper, and aluminum. More recently, it has been taking on a series of other functions in the allocation of a number of other materials; I will speak about that in just a moment. The Military Services submit their estimates based on the number of articles to be procured, and after having received their allotments and placed their orders, they pass out the materials-claiming tickets. Those tickets flow down through the economic system until they are canceled off against the orders of the steel mills, the copper and brass foundries, and the aluminum-producing factories.

You will see that the regulation is a regulation of what is going to be made. We are pretty far from the "protection of the public interest" in the old regulatory sense. The public interest in this case is the production of military materiel. It is the production of the minimum amount of goods required for the civilian economy. That means that we don't get in these allocations much of the kind of argument that would come up if we were trying to regulate private enterprise for the purpose of preventing abuse of power. In most cases, the question is how much can a manufacturer do, rather than what may he do.

Requirements and the requests to the Requirements Committee are divided up once each quarter. There is a comptroller who keeps track of the allotments so that we know how much material goes out each quarter, and that forms a part of the very important body of data used in the quarterly allocations. Obviously, the Requirements Committee itself is not going to handle all the details. The other details are left to the Program Bureau. The Program Bureau works with each of the claimant agencies as claims are submitted; then if there are major differences of opinion, those go before the Requirements Committee in which each of the claimant agencies is represented, and the matters are argued out there. If the decision can't be made unanimously in the Requirements Committee, even though we are arguing only about the last margins, the program vice-chairman has the authority to make the settlement. I think that settlement has never been questioned.

In addition to the allocation of these three materials, allocation also has to take place for a number of other subordinate materials. While these three were regarded, as I said, as proxies for the whole economy, we have had to develop a series of subcontrols on other materials in order that they should be integrated with this major control. That has meant that over the months one commodity after another has finally come under some kind of allocation. Some of it is very tight, some of it looser; but we try to integrate all these commodities so that each goes to the place where it will make its contribution, and that is anything but an easy job.

In addition to the allocations of basic raw materials, there are also allocations of numerous manufactured products. Allocation is usually made in the first instance by a Requirements Committee of the

Division of the War Production Board that is concerned with the product in question. These Division Requirements Committees are subcommittees of the top Requirements Committee. The same techniques are used. The claimant agency submits its claim and the Division Requirements Committee makes its decision. If there is an appeal by a claimant agency, the decision goes to an appellate committee of the Requirements Committee known as the Program Adjustment Committee. If there is still dissent from the decision of that committee, the matter goes to the top Requirements Committee. Obviously, very few of all the decisions that have to be made go to the top Requirements Committee; they are ironed out in advance. The program vice chairman has the authority at any time to intervene and make a decision which will prevent the particular dispute from going to the Requirements Committee. The present vice chairman has refrained from the use of this authority except in rare cases but, occasionally, when the matter does not seem of sufficient importance for the Requirements Committee, the decision will be made by the program vice chairman. Once you have a policy set by decision of the Requirements Committee, it is usually fairly easy to apply the same principles in other commodities. We have been building slowly a series of Division Requirements Committee decisions which control the materials and the products of those divisions against the over-all controls that have been established under the Controlled Materials Plan.

The controls of the over-all Controlled Materials Plan and the Division Requirements Committee allocations are, at times, not sufficiently precise to deal with certain of the very tightest items. When some of these very tight problems have come along, the only solution has been what we call scheduling. Those of you who are students of industrial management are well acquainted with the principles of scheduling in the factory. The attempt to apply scheduling principles to the factories within an industry is, as you can imagine, a complicated task which requires the most skilled handling. We have had considerable success in the few cases where scheduling has been applied. Bottlenecks created by the huge demand for certain essential products have been broken by securing from each manufacturer information as to orders on hand and delivery time, and then readjusting those orders and their delivery dates so as to produce the largest volume of manufactured products in the shortest time. This has enabled us to increase the volume of production by lengthening runs. Detailed scheduling has not been widely adopted, because its administration is extremely difficult. Nobody likes to get into the details of industrial operation quite as much as is necessary when you have to undertake one of these detailed scheduling operations.

So far, I have been talking almost entirely about positive controls; however, that is not the whole story. Since ours is a private-enterprise

economy, there is always incentive to try to manufacture nonessential civilian products, even when it is necessary to use facilities and management and manpower needed for war production. Because of this fact, we have also had to use negative regulations, usually imposed in the form of limitation orders. Under these orders, either the output of the manufacturers of a given product is limited to a percentage of some base period or the product itself is entirely prohibited. Sometimes these limitations have been approached indirectly by limiting the amount of material that could be used for certain products. If more articles were made other materials had to be used. The use of substitute materials always increases costs, and increased costs under price ceilings provide a pretty effective control. These limitation orders in the early days of conversion to a war economy were very important devices. Today their importance is relatively unimportant. The most striking of those orders, of course, was the one which prohibited the manufacture of automobiles. A series of other orders followed, which finally prohibited the manufacture of most of the other durable consumer goods. These were the factories needed for producing munitions; their immediate conversion took place when it was made impossible for them to manufacture other products. You had the combination process of push, in the form of remunerative military contracts, and shove, in the form of limitation orders which made it impossible to profit on nonessential civilian activity. This is the method by which we worked our way into a war economy.

The third device used, and which was essential, particularly on the civilian side, was that of the rationing of essential civilian goods. The War Production Board early got rid of this particular authority. I suppose the War Production Board was so rich in authority that it could get rid of it and not feel so very sorry. Rationing was one of the things that came, and Mr. Henderson, in his day, was good enough to take it. The Office of Price Administration has continued to handle it, and the rationing which the War Production Board itself has conducted has been called allocation. We are rationing industrial products and OPA is rationing consumer goods.

In the preparation particularly of limitation orders and the other regulatory devices we have in the War Production Board, we draw very heavily on the advice of industry. There has been both informal and formal machinery. The formal machinery is represented by the Industry Advisory Committees and the Labor Advisory Committees. In my own judgment, however, these advisory committees have provided less of the industrial contact which WPB has had than might be thought. WPB has plenty of industrial experience within its own staff; in fact, we sometimes have been accused of having too much. However that may be, we have thought it essential that we draw very heavily on the Industry Advisory groups wherever limitations were to

be imposed and, to a considerably less extent, on the Labor Advisory Committees.

The demand, however, that labor be more effectively recognized within the structure of the War Production Board led to the appointment within the Board itself of responsible labor officials. There is a vice chairman for labor production and another for labor requirements. Both of these officers have staffs, and they have participated all along the line in the development of the programs. The formal machinery for the representation of labor in the Board has been more marked than that of industry, but industrial influence has been stronger. I mean managerial influence as distinguished from labor influence. These two great representative groups, the Industry Advisory Committees and the Labor Advisory Committees, have at times been unusually valuable. We have had to draw on them for experience, particularly in the larger industries, and without them I am sure we would never have accomplished as much as we have.

Sometimes, when we have had a particularly tough order to issue, the cooperation of industry has been amazing. We have called together a representative group within the industry, discussed the whole issue with them, found terrific resentment, and finally, in spite of their opposition, we have said, "We are sorry, this is the way it is going to be." That group of men, even though overruled in their advice, have gone back to their industry and said, "This is the way it is going to be." I think I value that particular experience as much as any experience I have had in Washington. It indicates that there is within industry the same kind of patriotism that you find any place else. When people realize the job that needs to be done, it is amazing what they will do. I think I am as aware as anybody in Washington of the heavy pressure that industry can exert to get what it wants. I am also aware of what industry can do to see that the right thing is done; and I think it is that kind of experience in administration that makes many administrators willing to stay on the job.

The following paragraph with regard to compliance was added to the discussion because of the interest shown in this phase of the regulatory procedures:

The many controls imposed upon industry would have been ineffective if our regulations had not been complied with. In the early days of the Board, there was set up a separate group to handle compliance problems and, when it is considered that the operations of thousands upon thousands of corporations, partnerships, and individuals were brought under strict controls for the first time, it is realized what a remarkable job has been done in this respect. It has been the policy of the Board to get compliance, rather than to punish violators, and as a consequence there is no impressive figure of the fines and convictions for violation of War Production Board regula-

tions. The answer to compliance is rather to be found in the tremendous figures of war production. In all, the Compliance Division has made approximately 250,000 individual investigations. Approximately 1,000 individual administrative actions, such as modification of quotas or suspension of the violator from doing business for a certain period of time, have been taken by WPB compliance commissioners, many fines have been levied by the courts and some people have gone to jail, but by far the greater number of all compliance cases have resulted in the alleged violator agreeing to conduct future operations in conformity with regulations, and no further action has been taken by the Board. Compliance operations have been conducted without fanfare or publicity. Pretrial of cases in the newspapers has been avoided and great care has been exercised to see that alleged violators are not falsely accused. This has been important in generating a feeling of respect for the Board's compliance activities by industry at large. At the time of issuance of a new regulation the Compliance Division makes a detailed study of that regulation to determine the extent of probable violations, the persons most likely to violate, and the manner in which the regulation would be avoided. An intensive drive is begun almost immediately upon the issuance of the regulation to obtain strict compliance in its early stages. When the Controlled Materials Plan regulations went into effect, for instance, investigations of large operators were immediately made and within 6 weeks a compliance case was developed involving a nationally known manufacturer. A probationary order was issued against the company, which fact was widely circulated among the trade and publicity was given in trade papers. This and several similar instances at the inception of CMP had much to do with the high degree of compliance afforded these regulations.

REGULATORY PROCEDURES OF THE COAL AGENCIES IN THE DEPARTMENT OF THE INTERIOR

by
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Introduction

In the Department of the Interior there are a number of agencies engaged largely in carrying out programs looking to the conservation of the Nation's physical resources. Among these agencies are the Bureau of Mines, the Geological Survey, the Bureau of Reclamation, the General Land Office, the National Park Service, the Petroleum Conservation Division, the Division of Power, the Fish and Wildlife Service, the Grazing Service, the Solid Fuels Administration for War, and the Coal Mines Administration. All of them, to some degree, affect and regulate private interests.

It would be impossible, in the time available, to describe the regulatory procedures of all these agencies. Accordingly, I am going to confine my discussion to the procedures of the bureaus concerned with coal, since they offer an excellent case history for the appraisal of the varying techniques of regulation. On the one hand, circumscribed by a detailed and well-defined statutory pattern, there was—until August of last year—the Bituminous Coal Division. On the other hand, a creature of the war emergency and freely operating within the broad framework of Presidential Executive order, is the Solid Fuels Administration for War. The Coal Mines Administration, entrusted with the supervision and regulation of the Government-possessed coal mines, affords still another facet in the subject of regulatory procedures. An appreciation of the procedural problems of these agencies and an evaluation of their administrative techniques require some preliminary investigation of the economic conditions which brought them forth.

All three deal with the coal industry. The coal industry is the country's vast storehouse of heat and power. In 1940 bituminous coal alone furnished 44 percent of the annual supply of energy from mineral fuels and water power in the United States. Soft coal supplies about 75 percent of the energy used by public utilities and in manufacturing and about 83 percent of the fuel used by railroad locomotives. One of every four freight cars is a coal car.

THE BITUMINOUS COAL DIVISION

Because of the combination of physical and economic factors peculiar to the industry, it had been marked, for a long period prior to the enactment of the Bituminous Coal Act, by the chaos of a keen, unbridled, and often unscrupulous competition. The industry is made up of more than 10,000 individual units and, even before the first World War, these units were capable of producing more coal than the economy demanded. The overexpansion of the industry during that War and the falling off of coal consumption afterward greatly accentuated this overcapacity. Inspired by the economic pressure of high costs of idle mines, producers endeavored to achieve full production by reducing the price for their product out of all proportion to the cost of production. A bitter struggle for markets and a merciless cutthroat competition resulted. As Mr. Justice Cardozo put it, in his dissenting opinion in the Carter case: "Overproduction was at a point where free competition had been degraded into anarchy. Prices had been cut so low that profit had become impossible for all except the lucky individual." The industry tried to save itself by the organization of giant trade associations and the self-imposition of price and trade practice restrictions through such associations. It failed, however, to solve its problems. After at least nineteen separate Congressional investigations and hearings on coal, conducted from 1913 to 1937, the Bituminous Coal Act of 1937 was enacted by Congress as "the only hope of national solution of the innumerable problems of the bituminous coal industry."

The Bituminous Coal Act, which expired in August 1943, had for its central purpose the regulation of the sale and distribution of bituminous coal. Compared with other regulatory statutes of a similar nature, the Act was unusual with respect to its detailed and limited authorization and direction to the regulatory agency. This was undoubtedly a reflection of the blows dealt Government administration in the Hot Oil and Schechter cases; the Bituminous Coal Act was drafted and enacted in the wake of those adverse rulings.

The Coal Act was confined to one commodity, bituminous coal, and laid down a narrow path for administrative action. The area of regulation was restricted to the "domestic market." The duration of the Act was limited to four years. (In 1941 the Act was extended for an additional two-year period.) Coal producers were to be organized under the Bituminous Coal Code. For these code members, minimum prices were to be established in accordance with detailed procedures and elaborate standards set forth in the Act. Maximum prices could also be set, pursuant to narrow, specified standards. The sale, delivery, or offer for sale below the minimum or above the maximum prices, as well as numerous trade practices designated as unfair methods of competition, were made violations of the Bituminous Coal

Code for which the code membership of any producer might be revoked. Contracts for the sale of coal at prices below the prescribed minima or above the maxima were made invalid and unenforceable. Inducement to come under the code was provided by a penalty tax of 19½ percent imposed on producers who did not choose to become members under the code. Machinery was also provided by which producers might obtain exemptions from the price-fixing provisions of the Act and thus from the penalty-tax provision.

Administration of the Bituminous Coal Act of 1937 was originally entrusted to the National Bituminous Coal Commission. The many weaknesses inherent in the commission form of administration, namely, a lack of coordinated effort, internal friction and conflict, a lack of expedition and efficiency, an absence of centralized responsibility, the development of factions, all these became particularly accentuated in the Coal Commission and led to its dissolution in 1939. Under Reorganization Plan No. II, the administration of the Act was transferred to the Department of the Interior.

The Solid Fuels Administration for War

After the Japanese attack on Pearl Harbor, the problems of irresponsible competition were largely supplanted by those arising from the necessity to pattern distribution according to the needs of the war economy. In my opinion, despite the temporary suspension of the keen competitive struggle because of the rising demand, regulation of coal prices and of marketing practices to ensure a return equivalent to costs is still needed, both now and for the post-war period. Be that as it may, the most pressing problem now is to see to it that coal is delivered where it is most needed and when it is needed. The mechanics of an unregulated market are not designed to ensure an equitable distribution of an inadequate supply of fuel in face of a swollen demand. The Solid Fuels Administration for War was created to answer this wartime challenge.

The Solid Fuels Administration for War operates pursuant to an Executive order issued on April 19, 1943. The Administrator, who is also the Secretary of the Interior, is directed to "formulate plans and programs to assure for the prosecution of the war the conservation and most effective development and utilization of solid fuels," to "issue necessary policy and operating directives to parties engaged in the solid fuels industries," and to "appoint such general, regional, local, or functional solid fuels industry committees or councils as the Administrator finds necessary." The agency, in the exercise of its functions, has collected comprehensive data from the solid fuels industries and from other sources, both private and governmental, and on the basis of such data has made recommendations to other agencies concerning prices, equipment, manpower, and transportation for the solid fuels industries. It has issued many orders and directions for the di-

version of coal to areas and industrial plants where it is most needed, and has worked out broad programs for the limitation and allocation of coal distribution both for industrial and civilian use, as well as for conservation of the limited supply. It continues to carry on all these functions on a day-to-day basis, revising its programs to accord with modifications of the estimates of fuel needs engendered by shifts in the war program and by civilian economy. It is one of the most important and active of the Government's war agencies.

The Coal Mines Administration

The last of our coal agencies to be established is the Coal Mines Administration. This agency's functions center about the labor problems in the coal pits. A constant source of trouble to the nation since the turn of the century, labor relations in the industry broke down in April 1943, and resulted in widespread stoppages that involved hundreds of thousands of miners. Faced with the threat of catastrophe, the President, on May 1, 1943, directed the Secretary of the Interior to take possession of the coal mines for the Government. The Secretary has exercised his authority as Government custodian of the mines through the Coal Mines Administration.

The President instructed the Secretary to permit private management to continue its managerial functions to the maximum degree possible consistent with the national purpose of maximum production. Acting pursuant to the order, the Secretary took possession of approximately 3,800 coal mines. By October 12, 1943, under provisions of the War Labor Disputes Act, he had returned all the mines; however, new work stoppages began, and spread to such an extent by November 1 that the President directed the Secretary to retake the mines. The Secretary again took possession and, pursuant to the authority granted him, entered into an agreement with John L. Lewis on November 3, 1943, to govern the operation of the mines during the period of Government possession. The agreement has been approved by the War Labor Board and the President, and most of the mines of which the Secretary took possession on November 1 are operating under that agreement and are still in possession of the Government. The Attorney General has ruled that the mines need not be restored under the War Labor Disputes Act until the conditions that gave rise to their seizure have been eliminated and there is no longer reason to believe that production will be further interrupted.

During both periods, the Secretary determined to exercise only a supervisory, as distinguished from a proprietary, control over the operation of the mines and to interfere as little as possible with the existing management. As he views it, his primary function under the Executive orders has been to get coal mined, and he has never felt constrained to exercise more than supervisory or regulatory con-

trol. Regional managers have been set up in the various coal-producing regions, but orders, directions, and instructions from both Washington and the field have been held down to the barest minimum, and those which have been issued are of the garden variety of regulation, designed merely to assure that more coal will be produced.

The mining companies have been permitted to remain in actual and beneficial possession and in full and complete managerial control of their mines. The companies have continued to operate their mines for their sole account in the same manner as heretofore and in accordance with their customary policies and procedures and to utilize their customary management, officials, and personnel. They retain all their earnings and expend them as they see fit. Production, cost, and distribution policies are now, as they have always been, matters for their uncontrolled business judgment. A Federal operating manager has been appointed for the mines of each company; but he is the officer of the mining company who had been in charge of the operations of the mine prior to Government possession. He was appointed only after nomination by the company, and he can be removed upon the company's request. He continues to serve, subject to the orders and regulations of the Administrator, as an officer and employee of the mining company; and he is bound by all the restrictions and limitations imposed by the company upon his exercise of authority.

Industry's Participation in the Coal Agencies

It is not surprising that in all three agencies the intimate participation of the industry in the formulation and administration of the agencies' regulations has been deemed not only desirable but essential. The stabilization of the coal economy, the assurance of an equitable distribution of solid fuels, the maintenance of maximum production at mines ridden with labor controversy, all these involve complex economic and business problems which for their understanding and solution require a high degree of technical competency.

Recruitment of Industry Personnel

A considerable body of knowledge of the problems and practices in industry has been imparted to agency action, in all three cases, by recruiting able technical men from the coal industry. The industry generally has appreciated the necessity of Government action and has lent its experts more freely than might have been expected. But the coal industry is such a sprawling industry and its problems are so complex and diverse that it is doubtful whether it would be possible to build a staff adequately familiar with all the facts of coal production and distribution. For particularized information therefore, the Department has resorted to industry advisory groups, and the three coal agencies have liberally employed such groups.

THE DISTRICT BOARDS UNDER THE COAL ACT

The very design of the price-fixing process, which was the heart of the Bituminous Coal Act of 1937, was patterned for an active and constant participation by industry. The statutory scheme, indeed, is more in the nature of self-regulation by industry, subject to the review and check of the Federal agency, than of Governmental regulation.

To represent the industry, the Act provides for the organization in each of the 23 coal-producing districts (reduced to 22 soon after the organization of the agency, to eliminate a lignite district) of a representative industry board. Each of these district boards is to contain an even number of producer representatives, half of whom are elected by the majority vote of the tonnage of the district, and half by the majority in number of the local code members. In addition, one labor member is selected by the union representing the preponderant number of mine workers in the district. The responsibility for initiating the price-fixing process and the burden of carrying it forward are entrusted to these boards, subject to the "pervasive surveillance and authority" of the agency.

The procedure specified by the Act is an elaborate one, as follows:

1. All code member producers are required to file certain cost data with the agency. From compilations of these data made available to it, each district board determines the weighted average cost of production in its district and submits its determinations to the agency. The agency, after hearing, reviews the cost determinations, makes whatever modifications it deems appropriate, and returns the revised figures to the boards.

2. Thereupon, each of the boards proposes minimum prices f. o. b. the mines for all kinds, qualities, and sizes of coal produced in its district, and classifications of coal and price variations. The boards submit the schedules of the proposed prices and classifications, together with the underlying data, to the agency, which, after hearing, reviews the proposed prices, makes whatever modification it deems appropriate, and returns the revised figures to the boards.

3. With these revised basic price schedules, the district boards meet and coordinate the proposed prices in common consuming market areas on a fair competitive basis; that is, they correlate the prices of coals from competing districts moving into common consuming areas so as to avoid major dislocations in distribution and to save to each of the producing districts its competitive opportunities. The boards then submit the coordinated prices, together with the underlying data, to the agency, which reviews the prices, makes whatever modifications it deems appropriate, and promulgates the revised coordinated prices as the effective minimum prices for the various districts.

4. After the effective minima are promulgated, upon petitions filed by any code member, district board, or member thereof, any State or political subdivision, or the Consumers' Counsel, the agency may adjust any of the minimum prices established. An appeal to an appropriate Circuit Court of Appeals from any final order of the agency is permitted.

In actual practice, the district boards did not assume the initiative in the price-fixing process which the Act intended that they should exercise. The boards did successfully complete the first steps, involving the determination of district costs and the intra-district classification and pricing of coals, but even in these preliminary stages the burden of initiating, directing, and guiding the activity was the Federal agency's. When it became necessary for the boards to meet and correlate their prices with those of competing districts, the machinery of the Act broke down. Apparently the jealousies and suspicions engendered by years of bitter competition among producers in the competing districts made efforts at agreement futile, except in a few relatively unimportant districts. Perhaps in contemplation of just such an impasse, the Act provided that if the boards failed to carry out their assigned tasks, the agency might act in lieu of the boards. Under that provision, the agency took over the coordination functions; its experts worked out and proposed coordinated minimum prices, and these served as the basis for the final phase of the price hearing. Experience in this case proved that where a regulatory activity requires a balance among keenly competitive interests, the onerous and delicate task of achieving that balance cannot be successfully entrusted to the affected interests themselves. It must be performed by the Government.

There was much complaint about the structure of the district boards. The problem of minorities, always a difficult one in representative government, is also generally present in schemes for industry representation, particularly where, as here, the industry is composed of heterogeneous and highly competitive units. The strippers in the Midwest contended from time to time that their district boards, instead of representing them, excelled in advocacy for the interests of their bitter competitors, the deep-mine operators. The small producers, generally truck-mine owners, complained vociferously that their interests were being disregarded by the boards to which they were compelled to pay assessments. The Coal Division heeded these complaints when they came to its attention, investigated them, and, where deemed advisable, urged the reorganization of the district board. Where investigation showed that an adjustment of the price schedule was appropriate and the district boards neglected to institute proceedings for its revision, the Division commenced the proceedings on its own motion. The small operator, however, is less articulate and daring than his larger competitor and numerous hurts must have been nursed silently where district boards failed to take action.

THE BITUMINOUS COAL CONSUMERS' COUNSEL

The consumer interest in coal was assured protection by a novel provision in the statute, which established in the Department of the Interior an office of a Consumers' Counsel charged with the duty of appearing "in the interests of the consuming public in any proceeding before the Commission." In 1939 the President's reorganization plan transferred this function to the office of the Solicitor for the Department of the Interior, where the Consumers' Counsel Division was established. Congress, however, was dissatisfied to have a consumers' advocate subject to the supervision of the Secretary of the Interior, who also supervised and directed the Coal Division, and provided for the creation of the office of the Consumers' Counsel as an independent agency of the Government when it extended the Coal Act in 1941 for an additional 2-year period. By statute, the Consumers' Counsel had available to him all the data filed with the Division. In addition, he might engage in independent investigations and appear in proceedings not only before the Division but also before other Government agencies.

THE ACCESS TO HEARINGS BEFORE THE BITUMINOUS COAL DIVISION

Under the Coal Act, the Division was required to give full notice and opportunity for hearing in all matters in which the Division had substantive powers under the statute. Indeed, such notice was given even prior to the issuance of comprehensive orders requiring the mere filing of information. At the hearings, any and all persons who appeared were permitted to introduce evidence, cross-examine witnesses, make statements for the record, submit memoranda and briefs, argue before the examiners, and at times argue before the Director.

The Division was represented by counsel. The Division's marketing, statistical, economic, and rate experts served as consultants to the Division attorney, with a view to aiding him in the development of a comprehensive record. On occasion, these experts appeared as witnesses. During the hearing, the presiding trial examiner (or the Director), in his discretion administered oaths, received evidence, ruled on motions for continuances, and otherwise regulated the proceedings.

At the conclusion of the hearing, provision was generally made for oral argument before the trial examiner and for the filing of briefs with him. The examiner then prepared and filed his report with the Director and the parties were given opportunity to file exceptions thereto.

Upon request, arguments were held before the Director and briefs were received by him. The final order of the Director might accept or revoke the examiner's recommendations in whole or in part. In all cases of revocation and in some cases of acceptance, the reasons were fully stated. The Director exercised full authority to revoke the

recommendations of the examiner for reasons of law and policy and for reasons of fact.

The rules of the Division provided that a trial examiner's report might be waived by the parties, and in such cases the record was transmitted, upon the conclusion of the hearing, to the Director, for his decision. Irrespective of the waiver of the examiner's report and pursuant to statutory authorization, the Director, upon application and a reasonable showing of the necessity therefor, often granted temporary relief pending final decision in the price proceedings before the agency. Because of the necessity of expedition in these instances, the Director's practice was to pass directly upon the requests for temporary relief. In cases of extreme hardship and urgency, the Director's powers of temporary relief were exercised, after full notice to all parties concerned, upon the basis of affidavits, supplemented, where necessary to clarify the issues, by informal conferences which all interested persons were invited to attend and in which the issues raised by the applications for temporary relief were fully discussed.

Comments on Liberal Hearing Procedure under the Coal Act

The unrestrained admission of all persons who might have an interest in a Division proceeding and the unrestricted liberty accorded them to present evidence, cross-examine witnesses, and otherwise participate fully, undoubtedly resulted in some delay in getting the Division's job done. The inordinately long period between the enactment of the Coal Act, in April 1937, and the promulgation of the effective minimum prices, in October 1940, is unquestionably attributable in large part to the 387 parties and 240 attorneys (many of whom represented more than 1 client) who were permitted to appear in the general price proceeding. However, in such a proceeding, which is complex, national in scope, and affecting a welter of conflicting and keenly competing interests, it would have been foolhardy to have restricted the participation of industry unduly. Most of the written and oral evidence proved highly valuable to the Division's experts.

The delays resulting from the "undue process of law" of the hearing procedure under the Coal Act became particularly apparent in the maximum price proceeding, which was instituted by the Division on the application of the Consumers' Counsel. The Consumers' Counsel asserted that coal prices were generally excessive, and oppressed consumers. Such a complaint certainly called for expedition. Nevertheless, the proceeding dragged on interminably, and no findings had yet been issued when the Office of Price Administration took over the task of fixing the maximum prices for all commodities in the fight against inflation. Although portions of the record made in the maximum price proceeding proved to be of considerable value to the Office of Price Administration, large portions of the record reflected only argument and dilatory maneuvers of counsel.

THE INFORMAL CONFERENCE TECHNIQUE OF THE SOLID FUELS AND COAL MINES ADMINISTRATIONS

In contrast to these procedures, both the Solid Fuels Administration and the Coal Mines Administration have exclusively employed the technique of informal conferences in lieu of the formal hearing. In both cases, there is no statutory requirement that hearings be held, and administrative action, where it must be taken, must generally proceed rapidly. It is true that some issues permit longer and more comprehensive consideration. During the last heating season, however, when the Solid Fuels Administration had to issue a direction to a producer for the immediate shipment of a specified tonnage of bituminous coal to an industrial consumer without adequate stock-pile protection, or to a dealer in a town in the grip of a cold spell, with many bins lacking coal, it would have been pernicious luxury to have held a hearing to determine which producer should have been chosen to ship the coal and from which of his customers he should have been directed to divert the coal urgently needed elsewhere.

Nor does the tempo of the activity of the Coal Mines Administration permit resort to the hearing technique. Labor controversies—which have caused work stoppages or which may, unless immediately resolved, result in such stoppages—must be settled immediately, and the full operation of the affected coal mine must be immediately restored. Even where the issues involved have permitted the agencies a longer time for consideration, it has been felt that hearings would be too long for effective action and that informal conferences with representatives of the affected interests will serve as well to advise the agencies of the industry's position.

THE INDUSTRY ADVISORY COMMITTEES OF THE SOLID FUELS ADMINISTRATION

In both the cases just described, however, the underlying Executive orders contemplate the active participation of industry groups in the agencies' work. Several advisory groups have been created. Some of them participate in the administration process only to the extent of making recommendations concerning over-all policies and specific programs. Others actually assist in an advisory capacity in the execution of programs. Again, some groups perform both of these functions.

The Solid Fuels Advisory War Council belongs to the first category. The Council, in the light of reports of the distribution situation presented by the agency representatives and their own knowledge of coal conditions, evaluates over-all policies and specific programs proposed by the agency and independently recommends both policies and programs. The Council has 17 members representing all

branches of the producing and distributing groups and the coal-consuming public.

The National Anthracite Distribution Committee is composed of five producers, two wholesalers, and three retail dealers. Like the Solid Fuels Advisory War Council, it advises with the Federal agency with respect to policy, but its recommendatory role is confined to the formulation of anthracite-distribution programs. The Committee also participates in the execution of the regulatory program for anthracite at the wholesale level. The Supply and Distribution Subcommittee of the National Committee recommends each month to the National Committee what distribution should be made of so-called "excess tonnage" on the wholesale market. The National Committee then submits its recommendations to the agency.

Regional Anthracite Distribution Committees, composed of producers, wholesalers, and retail dealers, are not called upon to evaluate general policies and specific programs, but they participate in the administrative process by making recommendations to the agency's regional representatives concerning the merits of individual applications filed by retail dealers for permission to receive anthracite in amounts in excess of base-period tonnage figures.

Bituminous-coal shippers affected by particular facets of the regulatory activity of the Solid Fuels Administration are represented on the recommendatory Lake Dock Coal Advisory Committee and the Tidewater Dock Coal Advisory Committee. The bituminous-coal-distributing industry participates in the agency's administrative process chiefly through the Bituminous Coal Producers Advisory Boards. The nuclei for these boards were the old district boards that functioned under the Bituminous Coal Act, and the membership is in most instances the same. These advisory boards participate both in the formulation and in the execution of programs for bituminous coal.

An organizational hierarchy of advisory groups has also been provided, to assist the Solid Fuels Administration in controlling the local distribution of coal by retail dealers. A National Advisory Committee on Local Distribution, consisting of both bituminous and anthracite dealers, makes recommendations with respect to programs for distribution by retail dealers of solid fuels. Area Advisory Committees, which are now being established, will serve as centers of information for domestic consumers of coal in their areas. They will attempt to obtain coal for consumers in emergency need, and will also recommend emergency shipments of coal. Community Committees on Emergency Distribution are also being established for certain of the metropolitan areas to perform for their communities the same work that the Area Committees will perform in their areas.

THE INDUSTRY ADVISORY COMMITTEES OF THE COAL MINES ADMINISTRATION

The Coal Mines Administration has also set up advisory committees to aid it in its tasks, and the agency freely resorts to conferences with producer and labor representatives as problems arise.

On the day he issued his orders taking possession of the mines for the Government, the Secretary established Regional Advisory Councils, composed of representatives of labor and the operators, to consult with the agency's regional managers and to serve as their advisors. Because it soon became evident that no drastic changes were to be made in the method of mine operation, only a few matters of purely regional concern have arisen. As in the case of the Solid Fuels Administration for War, the district boards functioning under the Coal Act served as nuclei for the regional councils.

Prior to the formulation of the Regulations for the Operation of Coal Mines under Government Control, issued on May 19, 1943, representatives of the coal operators were consulted and their views were sought with respect to the various provisions of the regulations. After the mine workers struck again on June 20, it appeared that custody of the coal mines by the Government would have to be continued for some time, and Secretary Ickes called 29 principal owners and operators of bituminous and anthracite mines to a meeting in Washington to discuss a program advanced by him for continued Government supervision of the mines. That meeting resulted in the appointment of a committee of 8 bituminous representatives to confer further with the Secretary. During the remainder of the first period of Government possession, this committee was consulted before any major move was made by the Coal Mines Administration.

The proposed new terms and conditions of employment, which were effected during the November seizure, were negotiated by the Secretary of the Interior and the representatives of the United Mine Workers. No operator representatives participated. Once the new conditions were put into effect, however, comprehensive discussions by the Coal Mines Administration with both the operators and the union representatives preceded the issuance of the subsequent summary and interpretations. Two operator committees, one representing the anthracite fields and the other the bituminous industry, were set up to consult and advise with the agency, not only with respect to the interpretation of the terms and conditions of employment but also in connection with matters of policy and the issuance of orders and instructions relating to the operation of the mines.

THE COMPLIANCE PROCEDURES UNDER THE COAL ACT

The Bituminous Coal Act of 1937 is unusual with respect to the compliance machinery established. The statute provides that the

membership of any coal producer in the Bituminous Coal Code, and his consequent right to an exemption from the 19½ percent penalty tax imposed by the Act, may be revoked by the agency "upon written complaint by any code member or district board, or of any State or political subdivision of a State, or the Consumers' Counsel, after a hearing, with 30 days' written notice to the member, upon proof that such member has wilfully violated any provision of the code or any regulation made thereunder." In lieu of an order revoking the code membership of any violator, the agency might in its discretion issue an order directing the code member to cease and desist from violations, and upon failure of the code member to comply with such an order, the agency might apply to a Circuit Court of Appeals to enforce it. Thus, under the statute the primary onus for procuring compliance with the minimum price structure was entrusted to the producer-labor district boards. Although some of the district boards performed these obligations with credit, other boards failed miserably, and the agency was forced to employ its own compliance officers, operating out of the field offices, to make routine and regular inspections of the transactions of all producer code members, their sales agents, and the coal distributors. The activities of these compliance officers were supervised and directed ultimately by a chief compliance officer in the Washington office of the Division. Unfortunately, it became necessary for the agency to act in lieu of the district boards in numerous compliance proceedings.

Despite the failure of many of the district boards to shoulder the compliance burden, the necessity for formal hearings and examiners' reports, and the delays consequent to such cumbersome procedures, a substantial measure of compliance with the Act and with the Bituminous Coal Code was achieved. And, I suppose, where heavy tax penalties might result from the revocation of a producer's code membership, and where issues of fact are of primary importance, there is considerable reason for adherence to all the amenities of administrative procedure.

COMPLIANCE IN THE SOLID FUELS ADMINISTRATION

Perhaps because of advisory-group participation, compliance with the orders of the Solid Fuels Administration has thus far been good. The criminal and civil sanctions provided by the Second War Powers Act of 1942 are available to that agency as they are to other war agencies, but like the Office of Price Administration, the Solid Fuels Administration has heretofore relied and will probably continue to rely primarily on administrative action effective through suspension orders, rather than on the drastic sanctions of the War Powers Act. During the past heating season, no compliance corps was set up by the Solid Fuels Administration. Warning letters and conferences were used to bring the recalcitrants in line. There has been little complaint

against the Solid Fuels Administration of discrimination and unfair treatment by those affected, and this has undoubtedly contributed greatly to the excellent compliance record which the agency thus far can boast. However, an even tighter coal situation is looked for this next winter, and it is likely that the rigors of a more restrictive regulation will result in a larger measure of violation. As full compliance as is possible will be even more necessary, and accordingly steps are now being taken to have a formal governmental compliance program in readiness. Although hearings will have to be conducted, it is expected that the hearings will be characterized by an informality and disregard for technicalities that are not generally characteristic of peace-time agency compliance hearings. It is contemplated that the industry advisory groups will play no part either in the investigation of complaints or in the compliance hearings that will be provided. It will be expected, of course, that the industry advisory groups will cooperate in endeavoring to assure compliance through their influence on the members of the industry, and will also bring to the attention of the agency any instances of noncompliance with its programs. But the necessity for fairness and impartial adjudication would seem to make it advisable that there be no greater participation by industry committees.

Compliance in the Coal Mines Administration

In the case of the Coal Mines Administration, compliance with its directions and instructions has also been eminently satisfactory. If the management refuses to comply with an agency order, the agency, under the Regulations for the Operation of Coal Mines issued by the Secretary of the Interior, may supplant the operating manager designated by the company and appointed by the Government to represent the Government's interests, and may take over the operation of the mine and oust the mining company and its officers from control. Largely because of the cooperation of the operators, it has never been necessary for the Coal Mines Administration to employ this sanction. The industry advisory committees have been of considerable aid in obtaining compliance by the operators. Substantial compliance by labor has been obtained through the help of the officers of the mine workers' union. Ordinarily, local-grievance machinery already established by contract or custom is utilized to deal with local disputes. In the few instances in which these customary procedures have not resolved the controversy, and where the issues involved are of more than local importance, the Coal Mines Administrator or his deputy has determined the matter, but this only after comprehensive discussions with the advisory committees and the union representatives. In addition, where stoppages and apparent violations of the War Labor Disputes Act are investigated by the Department of Justice, the agency, at that Department's request, refers all the information in its possession with respect

to such stoppages to the Criminal Division of the Department of Justice, for whatever action it may deem advisable. To date, there have been two or three prosecutions of mine workers under this statute, and several are now pending. The Executive orders also permit the Secretary of the Interior to request the Secretary of War to send the military into the mines to preserve order, but it has not been necessary to resort to this drastic measure.

Conclusions

No one will dispute that in the life of any administrative agency the public interest for the furtherance of which it was created must predominate over all other considerations. It is my opinion, however, that in practically all cases the public interest will be successfully guarded and accomplished only if a full participation by the affected interests is permitted, encouraged, and fostered. Such participation not only makes for more workable but also for more democratic administration. It has always been a proud boast of Secretary Ickes that in carrying out the functions entrusted to him as Secretary of the Interior he has invariably gone to the people whose interests he must regulate for their advice, their aid, their cooperation, and, actually, for their consent. In his letter to the President, transmitting the annual report of the Department for the fiscal year ended June 30, 1943, Secretary Ickes said:

"Our bureaus and offices habitually formulate policy in consultation with spokesmen for the people who are affected by our policies, and many policies are also carried out in cooperation with representatives of the people. . . .

"In a word, so many of us are in such close and constant touch with other persons who work and fight for this Nation; we draw so much of our strength from them, and we are so conditioned by their thinking, that I hesitate to set it down unqualifiedly that we regulate anything. If we do, then it is certain that in doing so we discharge our part of this Government's obligation to govern with the consent of the governed. We regulate with the consent of the regulated. I am as proud of that as I am of all the accomplishment that is vouched for in this report."

The public administrator must be ever cautious that interest participation does not become interest domination. The ultimate determination of all issues must be that of the Federal agency, rather than that of the industry or the consumers' advocates. Undoubtedly, the task of the public administrator in balancing the numerous conflicting considerations and in furthering the interests of the public, as against the interests of the regulated groups, is a difficult task, but it certainly can be done without an ivory-tower isolation from the affected inter-

ests. A public administrator may undoubtedly remain 99.99 percent pure by obstinately refusing to deal with industry advisory groups, labor representatives, consumer advocates, or other interest combinations. But if he does refuse, his activities will be ineffective and his programs unworkable; and, I think, the public interest in the legislation will be defeated rather than protected.

I do not, however, subscribe to what we might term the philosophy of "undue process," which apparently was the basis for the cumbersome procedural provisions set forth in the Bituminous Coal Act of 1937. Except in proceedings that may result in substantial penalties, like the compliance proceedings under the Coal Act, I see little need for extensive and dilatory hearings and the unfettered participation of all persons who may have some remote interest in the formulation of the regulations. At least in such agencies as the Solid Fuels Administration and the Coal Mines Administration, where urgent demands make prompt action essential, informal working relationships with interest groups are adequate and preferable.

The nature of the job to be done must determine the structure and extent of the industry advisory organization. The complex price structure envisaged by the Bituminous Coal Act of 1937, requiring the compilation and evaluation of a mass of diverse data and consideration of a myriad number of local problems, made necessary a vast network of regional committees or boards. The similarly complex job of the Solid Fuels Administration again calls for the establishment of regional committees, and the necessity for maintaining a national balance in the distribution of solid fuels has led to the creation of a somewhat complicated hierarchy of national policy-considering groups. On the other hand, the Coal Mines Administration, confronted with a task which, though as difficult as that of Solid Fuels Administration, is characterized by a greater homogeneity, has found it much more effective to deal with national committees, both for management and labor. With accruing experience, the functions of advisory committees undoubtedly will have to be changed, certain committees outlive their usefulness, and new advisory groups have to be organized from time to time. The formulation of some regulations require more extensive conferences and more widespread participation than others. The nature of the disease will determine the remedy. The character and extent of industry participation should, in most cases, be left to the discretion of the administrative agency.

If there is arbitrary action, discrimination, abuse of power and authority, there is always Congress and, still more important in a democratic community, there is a vigilant and vigorous public opinion, to which, in the long run, all public officials are accountable.

THE ROLE OF THE ADMINISTRATOR IN THE REGULATORY PROCESS

by

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For the last 3 years of my 11 years in the Department of Agriculture,[1] I had very little, if anything, to do with the regulatory processes administered there. In the preceding 8 years the regulatory activities of the Department were, for the most part, something I was going to do something about when I got around to it, and I am sure I made a great many people very happy because I never did get around to it.

In the main, as I have looked over the lectures that have been given here, I thought they slanted rather heavily in the direction of wartime regulation, but I am sure that no one would assume that any of the lecturers thinks the place of regulation or the extent of regulation that has been found necessary in wartime, would be desirable as a general thing. I hope the lectures have led to more thinking about the general regulatory process than about some of the specific regulations that are transitory in their application and bearing on the social scene. In preparing this paper, my chief purpose has been to stimulate more general thinking about the regulatory process.

The Regulatory Process as a Phase of Political Government

All of you are familiar, I am sure, with James Landis's book, "The Administrative Process." That is an unfortunate title; it suggests that we are in need of some new terms and definitions in this field. For the phrase, "administrative process," certainly comprehends much more territory than Mr. Landis intended to discuss. But "quasi-legislative" and "quasi-judicial" are clumsy and inadequate phrases. Their chief value is that they reveal the fact that, until recently, the thinking and the administration in this entire field have been almost monopolized by the lawyers. Nevertheless, I strongly recommend Mr. Landis's book. It is an important contribution, and I agree with everything it says, with one important exception.

After first pointing out that our judicial tribunals are too remote from the social scene to regulate the technical conduct of business efficiently and with necessary dispatch, Mr. Landis proposes that administrative tribunals be made almost equally remote. This is a

[1] Mr. Appleby was Assistant to the Secretary of Agriculture from 1933 to 1940 and Under Secretary of Agriculture from 1940 to 1944.

fundamental error. To be sure, there is much to be said in favor of that kind of detachment. Regulatory agencies must not be too readily responsive to the influence of interest groups, and they should be to some extent especially insulated from pleading by special interests; but they must be much more quickly responsive than are the courts to the tides and movements of popular sentiment and to changes in conditions. That is the very reason for their existence.

The administrator of a regulatory agency is, therefore, one who is concerned, first of all, with the adjustment of government to social needs and demands. I know of no more fundamental principle for democracy than this, that every activity of government must be responsive to the need for changes in policy as shown in free popular elections, as revealed in the administrative process, and in many other ways. In the executive branch this assurance of responsiveness must rest in the possibility of ultimate control over administration by the President. Let it be granted at once that the Chief Executive should not be as free to direct and control the course of government in dealing with administrative tribunals as with other types of administrative agencies. We do not want our regulatory bodies to bend with every shifting current of public opinion; nonetheless, it is essential that they respond to what Justice Holmes called "changes in felt needs;" and in time of war this response is often imperative. The role of the President in making this broad adjustment within the Government as a whole symbolizes one of the principal functions or responsibilities of the administrator of a regulatory agency.

Some of the functions of administrators of regulatory agencies are patently like those of other public administrators. They must be concerned with everything that comes under the head of management —with organizational structure, personnel policies, fiscal management, procedures designed to ensure an efficient flow of work, and all the rest. Beyond this, they must be concerned, both administratively and in terms of social impact, with relationships between their own and other regulatory programs. They must be the bridge between the rest of the Government of the United States and those specialized segments of it that have to do with regulation. Finally, they must be a bridge between their own regulatory agencies and the general public, as contrasted with the specific public on whom their regulations have their impact.

All good government must ultimately be responsible to the people. It is a composite thing, influenced by many factors and forces. I suppose one of the hardest things for me to learn was that Government does practically nothing that should not be a composite product. Everyone wants to have a simple job, to know what his responsibility is, to be able to go ahead and do his work; yet all of the Federal Government must be a composite thing influenced by many factors and forces. An executive must defer to those under him on whose judg-

ment, initiative, and efforts he relies, just as those under him must defer to him and to his decisions. The whole group must defer similarly to the authority and prerogatives vested in other parts of the Government. And in a democracy all government must be influenced in its actions by popular thoughts and feelings; what it does in any instance is determined by nobody, but is influenced by everybody. Government is not something simply divisible into three parts—executive, legislative, and judicial; the parts are themselves divided, and the whole is something much more than the sum of those parts. As I visualize the players on the field of government, the types that stand out are not executives, legislators, and judges, but rather highly specialized technicians, generalized specialists, technical administrators, general administrators, political administrators, administrative politicians, and politicians.

All these have a part to play in the regulatory process, which cannot afford to get along without any of them. The balance in a regulatory agency should, of course, be somewhat different than in a service or operating agency; the nature of its relationships with the affected public should be somewhat different; and the type and tempo of its responsiveness to changing popular opinion should generally be somewhat different. But, for all that, in its general nature the regulatory process should partake of the character of democratic government. In other words, it should be conceived as a part of the process of political government, with the administrator serving as a bridge between the parts.

Once this is frankly admitted, or thoroughly understood, the way is open for discussions which will be much more fruitful than those that rest largely on distinctions between what is "quasi-legislative" and what is "quasi-judicial." For the essential distinctions in this field are not exclusively, or even mainly, legalistic; they relate rather to the purposes and to the incidence of the various regulatory programs. Lawyers, as such, are simply technicians in the process of administrative regulation. If they become administrators in regulatory agencies, it should be least of all for the reason that they are lawyers.

SOME REGULATION MAY BE A NECESSARY EVIL—BUT HOW MUCH?

No one likes a regulatory program. I have never found in the Federal Government any general belief in regulatory activities, or any advocacy of them. I have never heard any group of people in Washington discuss the regulatory device as something generally desirable or as offering a general and fundamental solution for our social needs. Politicians and administrators alike always prefer to adopt or administer programs that set broad bounds or create general conditions within which conduct and activity would be substantially unregulated. As I see it, our Government often resorts to regulation much as a par-

ent spanks the baby—more or less in desperation, not knowing what better to do.

Actually, regulation is resorted to for a number of different reasons, and the reasons may be different at different times. The impact on the public, too, may be different at different times.

None but the inebriated fails to appreciate the necessity for traffic regulation, where the rules are designed mainly to help "A" know in advance what "B" is going to do, and vice versa, so that both "A" and "B" can use the highway to their maximum advantage. Government never meets with any serious resistance or difficulty in the administration of such regulations.

Where the trouble comes is in those fields—and they are almost without limit—where for "A" to be allowed to insist upon his maximum advantage would mean that "B" would have to forego some right or some degree of benefit to which our society at a particular stage of enlightenment says he is entitled. In these vast fields, as just suggested, the Government should first try to ensure equity by plainly defining the outer or upper limits for the pursuit of self-interest and by positive measures calculated to enable every man to take care of himself. Without doubt the best examples of such positive measures are free, compulsory education and the franchise. As a matter of historical record, what the Government has done, by and large, is to try to ensure this equity of rights and benefits.

Yet, obviously, we have far more governmental regulation today in many fields than is implied in this approach. Much of it is directly related to the war and will in due course be discontinued. As for the rest, it is, or was initially, made necessary largely because we have not yet learned to govern our actions and relations with our fellow men with truly civilized self-restraint. It is undoubtedly true that some minimum of regulation will always be required in different fields, at different times, and to different extents. It is a mistake, however, to assume that that minimum is a fixed and settled quantity. One of the things the chief executive of a regulatory organization should understand is that by showing his staff how to enforce their regulations in such a way as to educate the public to appreciate the need for them, and also to appreciate their justice, they may be able to get the public to accept the regulations as their own. Once this has been accomplished, though the regulations may remain on the books and though the regulatory agency may itself continue for a while to go through its motions, this field of conduct or activity has, in effect, been withdrawn from the realm of governmental regulation. For by chastening its own sense of self-restraint, the public has made what was formerly a rule of government a part of its own code of conduct. If this theory seems too sanguine, at least it indicates a line of development fully borne out by experience, a line of development calling for modification of procedures, if not for their elimination. Since, in an increas-

ingly complex society, it seems likely that the number of regulations is likely to increase the effort to soften and eliminate old ones will have growing importance. And surely the effort to get acceptance for regulations, and to make them as tolerable as possible, is an important part of the administrator's responsibility.

The Administrator's Conception of Himself

Having described the role of the administrator in broad terms and having discussed briefly the prospects for reducing the general volume of governmental regulatory activity, we turn now to a closer view of the head of a regulatory agency. No executive can succeed in getting his agency to do its work fully and efficiently without first having a vividly accurate conception of his own part in its program. The man who carries top responsibility for a program of regulation should devote his energies to a limited number of tasks. His first function is to ask, and keep on asking, a number of basic questions relating to the area of discretion—that area will change from time to time—which the Congress intended he should have and probably would intend him to have at any future time. What are the needs and purposes to be presently served by this regulatory process? Are these purposes of such a character that they would be unheld by the courts today as a reasonable interpretation of the given organic act? How may these purposes be served most economically, most simply, most equitably, most acceptably? To what extent and in what ways do these criteria call for the agency to modify existing methods and procedures?

Much of our regulation is designed to define the area of competition between firms in a specific field of business or industry. A minimum wage act, for example, declares that employers may not compete with each other by paying less than a certain wage. Although employers tend to resist the introduction of any such regulation, in practice they may not much care, once it has been established. They may even silently welcome it as clarifying their problems and simplifying the scene of their operations. It protects the more enlightened against the less enlightened; it ensures the observance of certain basic standards of competition.

After a law of this particular type is understood and its fair enforcement has been assured, it simply becomes a part of the familiar way of doing business. Indeed, to defend it may even become a tenet of conservative gospel. If we were to do away with the Interstate Commerce Commission, I think the railroads would be more excited about it than anybody else. Inevitably, the problem of enforcement for the regulatory agency concerned changes with such a change in sentiment. The administrator should always be alert to recognize these changes in operating situation.

In exactly the same way, he should be keen to recognize and satisfy new needs. He must be ready, with changes in the climate of opin-

ion, to propose modifications in legislation, taking care meanwhile, however, not to compromise the discretion of his operating officials.

For these reasons, he should never regard the actions of his agency simply as so many cases on the docket, merely looking at each finding to see that it is justified and in proper form. He must try to visualize its whole flow of work and discover both problems and opportunities in the sum total of the operations of the organization. In my experience with the Department of Agriculture that is the thing that was hardest to do—to get an idea of the impact, of the nature, of the whole flow of cases which kept coming in.

New statistical techniques and short cuts, new methods of scientific analysis, new structural arrangements and systems of procedure, new attitudes on the part of the public—these are illustrative of the material out of which a good administrator can and must make the regulatory process at once more efficient and more tolerable. Ingenuity, or rather an attitude by which he invites and generates ingenuity, is the quality essential to good administration here. It is the duty of the administrator to develop in his organization a clear sense of obligation continually to examine its own functioning and to seek new devices and methods for the better performance of its work.

GUARDING AN AGENCY AGAINST PETRIFICATION

The attitudes and faculties mentioned cannot be adequate if they exist simply in the person of the individual who happens to be the top administrator. If he is a good administrator he will do two things about them: (1) He will try to make these attitudes and faculties characteristic of the organization as a whole; that he will have to do in many different ways. (2) He will lodge specific responsibility for them with special-staff units. In time, all organizations tend to petrify, to confuse means with ends, and ultimately to oppose the very things they were set up to further. Yet large achievement is possible only through organization; therefore, a good administrator does what he can to organize his agency against these tendencies. He will look continually for new ways of breathing life into his staff, of revitalizing it, of reorienting it to changing events and circumstances.

If a top administrator is wise, he will assign to special-staff aides primary responsibility for examining and reexamining the functioning of his organization, and for finding and proving new and better methods of managing its operations. Jefferson believed that societies could avoid becoming petrified only through periodic revolutions. Our administrative agencies also probably have to have revolutions and explosions once in a while, but the best administrator is one whose handling of the job makes these drastic changes less frequent and less necessary. He can accomplish this, however, only by giving the searching kind of attention I have been describing to his selection and management of personnel, to the need for changes in structure, to

fiscal management, and to the many other ways by which he is able to exercise leadership. The things he says in speeches, the memorandums he writes, the points he makes in conferences, all these are important to his administration.

KEEPING ABREAST OF AGENCIES IN RELATED FIELDS OF WORK

Perhaps one of the most fruitful things an administrator can do is to keep in touch with other regulatory agencies and other parts of the Government. The rank and file of his organization cannot do that adequately. Yet they will all profit enormously from knowledge and study of the variety of regulatory experiences. Beyond this, a chief function of the administrator is to serve as a bridge between his organization and all the rest of the Federal Government, of which it is a part. Only with the perspective which he may gain by viewing his organization as a part of the whole Government, can he relate what his agency is doing to what is transpiring in the rest of the political realm.

As was implied earlier, one of the hardest things for personnel in a regulatory agency to do is to recognize that they and it *are* inescapably a part of the political scene. Apparently they try to avoid acknowledging the fact because they are afraid that to admit it would be somehow to compromise their integrity. That should not be the case. The maximum fulfillment of the social purposes to which they are devoted is utterly dependent on their functioning effectively as a political organ.

Regulatory agencies are not political in the sense that they try to name or elect candidates, or anything of the sort. They are political in the sense that they are governmental bodies and that they operate with reference to the electorate. It is an intrinsic part of their virtue we are talking about when we insist that they must operate in a governmental way; it is thus they are devoted to the public good. (What I am saying is that an agency cannot do that in its sleep, or simply by following precedent or convention, or by being impersonal. Eternal vigilance is the price of good government.) A regulatory agency cannot be whimsical. It must operate according to principle. Its conduct must be characterized by good judgment. It is entirely proper, even necessary, for a regulatory agency to have regard for popular reaction. I have heard the story—perhaps it is apocryphal, but I hope it is true—of one Supreme Court Justice saying to another, "Well, we got a good press on the Blank decision." Administrators responsible for regulatory bodies must be keener and quicker in political discernment than are the justices of the Supreme Court. They must know how to interpret accurately and promptly what is said with reference to their functions, not only in the press, but also in the letters they receive and by their many callers.

DEFENSE OF JUDGMENTS EXERCISED BY STAFF

It is not only the head of the agency who needs to have and to use a sense of discretion. The field of discretion must extend all the way down the line through enforcement officials. There must be provision for some variability in individual cases. Even the lawyers will admit, I suppose, that ideal justice in the courts calls for some differentiation according to individual circumstances. Surely that is true in administrative cases. Yet whatever the procedure followed, it must be explainable in terms of principles and of general applicability; it must not be capricious; and it must not deal in special favors. The whole field cries aloud for people with superior judgment. The end desired is the steady maintenance of fair standards, not punishment. Punishment is desirable only insofar as it supports the end—the maintenance of the standards themselves.

To administer an organization with such functions is a most difficult responsibility. It is my conviction that, insofar as possible, discretion of the kind just described should be exercised before formal complaints are issued, rather than in the actual handling of complaints. And I am inclined to believe that questions calling for discretion should be handled chiefly by officials whose rank is lower than that of the top administrator—that recommendations for milder courses of action should move—usually, though not always—from below upward, rather than from above downward. For one thing the particular deviation initiated at the top would be more likely to reflect an *improper* political influence. But there is an administrative consideration, too.

In most cases the man at the top needs to be more unyielding than anyone below him. Otherwise he will corrupt the functioning of his entire agency. Each of his retreats will force the whole organization to move backward. The man at the top should give general encouragement to a considerate, sensible plan for enforcement, but he should be most reluctant to dictate decisions in particular cases. I used to say that I spent 90 percent of my energies in defending to others the actions of the people in my Department, and 10 percent privately in questioning or raising sand with them. I think some such proportion is about right.

An organization can only be as strong as the man at the top permits and helps it to be. Adjustment of particular cases should never be determined at any one level, because that would invite collusion and corruption. It should be progressively harder at each successive level up the hierarchal ladder for those being regulated to obtain individual concessions in their favor. At the top there must be national responsibility for national principles and objectives. Toward the bottom there should be a limited adjustability to particular circumstances.

IMPORTANCE OF FLOW OF CASES RATHER THAN PARTICULAR CASES

The man at the top, therefore, needs to shield himself with certain protective devices, similar to but not identical with those of the courts. He needs to protect himself against friends and persons of special influence. He should hear no one informally, except in the presence of responsible enforcement aides, and should make no decision at such times, but should always require analyses and recommendations to come before him in the normal way. He should know that acquaintance with a case established in such a way can properly be of more value to him in other cases than in that one. He should distrust his own judgment whenever he becomes acquainted with any case in a way in which he cannot be acquainted with all cases coming before him. It is the conduct of the flow of cases, much more than the conduct of particular cases, that is his responsibility. His organization of that flow is his principal job.

To organize the flow of cases so that the agency's police work is not confused with adjudication, nor rule-making with other functions; to organize and direct it so that the responsibilities of all the different branches of the organization come into proper focus; to organize it so that in the performance of its job the agency will do its part in forming a chassis for the body politic and in providing essential lubrication for its ball-bearings—this is, in sum, the role of the administrator in a regulatory agency.

A TWELVE POINT PRIMER[1]

by
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1. With the country as big and complex as it is, administrative tribunals like the Interstate Commerce Commission are necessities. Probably we shall have more rather than less. To be successful, they must be masters of their own souls, and known to be such. It is the duty of the President to determine their personnel through the power of appointment, and it is the duty of Congress to determine by statute the policies which they are to administer; but in the administration of those policies these tribunals must not be under the domination or influence of either the President or Congress or of anything else than their own independent judgment of the facts and the law. They must also be in position and ready to give free and untrammeled advice to both the President and Congress at any time upon request. Political domination will ruin such a tribunal. I have seen this happen many times, particularly in the States.

2. The courts were at one time much too prone to substitute their own judgment on the facts for the judgment of administrative tribunals. They are now in danger of going too far in the other direction. The principle that it is an error of law to render a decision not supported by substantial evidence is a salutary principle. The courts should enforce it.

3. An administrative tribunal has a broader responsibility than a court. It is more than a tribunal for the settlement of controversies. The word "administrative" means something. The policies of the law must be carried out. If in any proceeding the pertinent facts are not fully presented by the parties, it is the duty of the tribunal to see to it, as best it can, that they are developed of record. A complainant without resources to command adequate professional help should be given such protection. The tribunal should also be ready to institute proceedings on its own motion, whenever constructive enforcement of the law so requires.

4. There is no safe substitute in the procedure of the tribunal for full hearing and argument of the issues, when they are in controversy, although the hearing need not always be oral. This takes time, but it is time well spent.

[1] From remarks by Mr. Eastman at a dinner in his honor, upon completion of 25 years of service as a member of the Interstate Commerce Commission, Feb. 17, 1944. (Reprinted by permission from the *I. C. C. Practitioners' Journal,* April 1944.)

5. The decisions of the tribunal should present succinctly the pertinent facts, as they are found to be, and the conclusions reached, but also state clearly the reasons for the conclusions.

6. The statutes which the tribunal administers should be well, simply, and carefully framed, but the personnel which does the administering is more important than the wording of the statute. Good men can produce better results with a poor law than poor men can produce with a good law.

7. It is not necessary for the members of the tribunal to be technical experts on the subject-matter of their administration. As a matter of fact, you could not find a man who is a technical expert on any large part of the matters upon which the Interstate Commerce Commission finds it necessary to pass. The important qualifications are ability to grasp and comprehend facts quickly, and to consider them in their relation to the law logically and with an open mind. Zealots, evangelists, and crusaders have their value *before* an administrative tribunal, but not *on* it. Other important qualifications are patience, courtesy, and a desire to be helpful to the extent that the law permits.

8. Moral courage is, of course, a prime qualification, but there are often misapprehensions as to when it is shown. The thing that takes courage is to make a decision or take a position which may react seriously in some way upon the one who makes or takes it. It requires no courage to incur disapproval, unless those who disapprove have the desire and power to cause such a result. Power is not a permanent but a shifting thing. I can well remember the time when it was a dangerous thing to incur the displeasure of bankers, but there has been no danger in this since 1932. It became a greater danger to incur the displeasure of farm or labor organizations. There is nothing more important than to curb abuse of power, wherever it may reside, and power is always subject to abuse.

9. Selection of the members of an administrative tribunal from different parts of the country has its advantages, but they turn to disadvantages if the members regard themselves as special pleaders for their respective sections.

10. Sitting in dignity and looking down on the suppliants from the elevation of a judicial bench has its dangers. A reversal of the position now and then is good for the soul. It has for many years been my good fortune to appear rather frequently before legislative or Congressional committees. They are a better safeguard against inflation than the OPA.

11. In any large administrative tribunal, like the Interstate Commerce Commission, a vast amount of the real work must necessarily be done by the staff. It is a difficult problem to give the individual members of the staff proper recognition for work well done—recognition on the outside as well as the inside. It is very important that

this problem be solved, but I am frank to say that its full solution has not yet been reached.

12. One of the great dangers in public regulation by administrative tribunals of business concerns is the resulting division of responsibility, as between the managements and the regulators, for the successful functioning of these concerns. For example, there was a tendency at one time, and it may still exist, on the part of those financially interested in the railroads to think of the financial success of those properties solely in terms of rates and wages and the treatment of rates and wages by public authorities. Sight was lost of the essentiality of constant, unremitting enterprise and initiative in management. The importance of sound public regulation cannot be minimized, but it must not be magnified to the exclusion of those factors in financial success upon which ordinary private business must rely.